
IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No.

WILLIAM JAMES RUMMEL,

Petitioner,

v.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

SCOTT J. ATLAS
VINSON & ELKINS

2100 First City National
Bank Building
Houston, Texas 77002

Counsel for Petitioner

Of Counsel

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

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**PETITION FOR WRIT OF CERTIORARI TO
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Petitioner William James Rummel respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit en banc entered on December 20, 1978, in *Rummel v. Estelle*.

OPINIONS BELOW

The clerk's letter concerning entry of judgment of the court of appeals, dated December 20, 1978, is reproduced in a separately bound Appendix at Appendix A. (2a). The en banc opinion of the court of appeals, dated December 20, 1978, is reported at 587 F.2d 651 and is reproduced at Appendix A. (3a). The order denying the petition for rehearing, dated March 9, 1979, is reproduced at Appendix A. (1a). The panel opinion of the court of appeals,

dated March 6, 1978, is reported at 568 F.2d 1193 and is reproduced at Appendix A. (24a).

JURISDICTION

The judgment of the en banc Court of Appeals for the Fifth Circuit was entered on December 20, 1978, and the petition for rehearing was denied by that court on March 9, 1979. This petition for a writ of certiorari is being filed within 90 days of both dates. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the mandatory life sentence imposed on William James Rummel under the Texas habitual offender statute for theft by false pretext of \$120.75, with prior convictions for presenting a credit card with intent to defraud of property worth approximately \$80.00 and passing a forged \$28.36 check, constitutes cruel and unusual punishment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions involved —the Eighth Amendment to the United States Constitution, article 63 of the Texas Penal Code of 1925, and its successor statute, article 12.42(d) of the Texas Penal Code of 1974 — are set out in Appendix B. (56a).

STATEMENT OF THE CASE

As stated in the Fifth Circuit panel opinion and quoted by the en banc opinion, the relevant facts are as follows:

In January 1973 a Texas grand jury indicted Rummel for the felony offense of obtaining \$120.75 under false pretenses. The indictment also charged him with having two prior felony convictions: presenting a credit card with the intent to defraud of

approximately \$80 [in 1964] and [passing] a forged instrument with a face value of \$28.36 [in 1969]. [A] jury found him guilty as charged [of the false pretenses offense]. After the state proved his two prior convictions, Rummel received an enhanced sentence of life imprisonment under the Texas habitual criminal statute then applicable, Tex. Penal Code Ann. art. 63 (Vernon 1925). [T]he Texas Court of Criminal Appeals affirmed his conviction. . . . Rummel applied for postconviction relief and raised in the Texas courts the [issue presented here and an ineffective counsel claim], but his application was denied without a hearing. Then Rummel sought habeas corpus relief [on the same grounds] in the federal district court, which also denied his petition without a hearing.

Rummel v. Estelle, 568 F.2d 1193, 1195 (5th Cir. 1978) (panel opinion), quoted in *Rummel v. Estelle*, 587 F.2d 651, 653 (5th Cir. 1978) (en banc). On March 6, 1978, by a 2-1 vote, a Fifth Circuit panel reversed the district court decision and held that article 63's automatic life sentence was cruel and unusual as applied to the offenses for which the sentence had been assessed. 568 F.2d at 1193.

By an 8-6 vote, the Fifth Circuit sitting en banc vacated the panel opinion, affirmed the district court's denial of the petition on the Eighth Amendment issue, and remanded the case to the panel for reconsideration of the Sixth Amendment issue. The en banc court held, in short, that while a severe sentence imposed for a minor offense could be cruel and unusual solely because of its length, 587 F.2d at 655, Rummel's automatic life sentence does not violate the Eighth Amendment because Rummel failed to prove that the legislative scheme has no rational basis and is totally and utterly rejected in modern thought, *id.* at 661-62. The en banc court relied on the following grounds: (1) Texas' good time credit system gives Rummel an opportunity to become eligible for parole in twelve years if he behaves

while in prison, *id.* at 657-59; (2) the nature of the three underlying offenses triggering the mandatory application of article 63 is irrelevant because the statutory purpose is to punish a three-time felony offender irrespective of the nature of the underlying offenses, *id.* at 659; (3) Rummel might have received a comparable sentence in several other jurisdictions, *id.* at 659-60; (4) Rummel's sentence cannot appropriately be compared to the penalty for any single offense in Texas, *id.* at 660; and (5) the test of "whether significantly less severe punishment could achieve the purposes for which the challenged punishment is inflicted," *id.* at 660-61 (quoting the panel opinion, 568 F.2d at 1198), has no role in Eighth Amendment analysis.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS IN APPLYING EIGHTH AMENDMENT DISPROPORTIONALITY ANALYSIS TO A HABITUAL OFFENDER STATUTE MANDATING A LIFE SENTENCE FOR COMMISSION OF THREE RELATIVELY TRIVIAL, NON-VIOLENT PROPERTY OFFENSES.

In *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), cert. denied as untimely filed, 415 U.S. 938 (1974), the Fourth Circuit held that a life sentence mandated by a West Virginia recidivist statute (identical in all material respects to the Texas law) was cruel and unusual based on length alone because it was grossly disproportionate to the underlying offenses. The state court had enhanced Hart's punishment for committing perjury at his son's murder trial to life imprisonment on the basis of a 1955 conviction for interstate transportation of forged checks totaling \$140.00 and a 1949 conviction for writing a \$50.00 check on insufficient funds. In determining that the statutory punishment violated the Eighth Amendment as applied to Hart, the

Fourth Circuit considered cumulatively (1) the nature and gravity of the offenses, (2) whether a much less severe penalty could accomplish equally as well the legislative purpose behind the punishment, (3) the punishment that the defendant would have received in other jurisdictions, and (4) the punishment prescribed for other offenses in the same jurisdiction.

Hart and *Rummel* cannot be reconciled because, unlike the *Rummel* court: the *Hart* court (1) relied heavily on this Court's decision in *Weems v. United States*, 217 U.S. 349 (1910); (2) held that in considering the nature of the underlying offenses and in comparing them to the penalties for other offenses in the same jurisdiction, not only the number of offenses but also their gravity must be considered; (3) did not consider parole eligibility as a factor mitigating the harshness of a life sentence; (4) used a "much less drastic means" test based on the statutory purpose as one factor in the disproportionality inquiry;¹ and (5) did not require the prisoner to prove that the punishment assessed was totally irrational.

2. THE DECISION BELOW APPLIES INCORRECTLY THE RELEVANT TEST PRESCRIBED BY APPLICABLE DECISIONS OF THIS COURT FOR EVALUATING WHETHER A PARTICULAR SENTENCE IS UNCONSTITUTIONALLY DISPROPORTIONATE.

The principle that an excessively long prison sentence for trivial offenses can violate the Eighth Amendment has

¹ Cf. *Downey v. Perini*, 518 F.2d 1288, 1291-92 (6th Cir.), vacated and remanded on other grounds, 423 U.S. 993 (1975) (declaring excessive a 30-60 year sentence imposed on a first drug offender for sale of a small amount of marijuana, in part because the legislative purposes of the statute could be achieved by a much less severe penalty).

long been recognized by this Court, first in *Weems*² and repeatedly since.³

As pointed out recently by Justices Marshall and Powell in *Carmona v. Ward*, 47 U.S.L.W. 3460, 3461 (U.S. Jan 9, 1979) (No. 78-5531) (dissenting from denial of certiorari) (mandatory life sentence for possession of small amount of cocaine) (emphasis added):

² Although *Weems* was based in part on the inherent cruelty of the punishment, it also rested on the separate grounds that the Eighth Amendment prohibits excessive punishment as well and that the length of punishment must be proportioned to the offense. See *Weems*, 217 U.S. at 367-68, 371-73, 377; accord, *Carmona v. Ward*, 47 U.S.L.W. 3460, 3461 (U.S. Jan. 8, 1979) (No. 78-553) (Marshall & Powell, JJ., dissenting from denial of certiorari); *Hutto v. Finney*, 98 S. Ct. 2565, 2671 (1978); *Furman v. Georgia*, 408 U.S. 238, 325 (1972) (Marshall, J., concurring); *Gregg v. Georgia*, 428 U.S. 153, 171-72 (1976), quoted approvingly in *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (White, Stewart, Blackmun & Stevens, JJ., plurality opinion). See also *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (Powell, Burger, Stewart, Blackmun & Rehnquist, JJ.).

The en banc opinion refuses to recognize *Weems* as good law because of a subsequent decision in *Badders v. United States*, 240 U.S. 391 (1916), which the opinion characterizes as "summarily dismiss[ing] a proportionality attack on a five-year sentence." 587 F.2d at 655 n.7. But a five-year sentence hardly compares to a life sentence. Moreover, *Badders*, which does not mention *Weems*, is not even a disproportionality case: the convicted defendant's only Eighth Amendment objection challenged the mail fraud statute's making the deposit of each letter a separate offense. See 240 U.S. at 393.

³ *Gregg*, 428 U.S. at 173 (Stewart, Powell & Stevens, JJ., plurality opinion), quoted approvingly in *Ingraham*, 430 U.S. at 691 n.9 (White, Brennan, Marshall & Stevens, JJ., dissenting); *Furman*, 408 U.S. at 272 n.14 (Brennan, J., concurring); *id.* at 457 (Powell, Burger, Blackmun & Rehnquist, JJ., dissenting); see cases cited in note 2 *supra*; compare Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause*, 126 U. Penn. L. Rev. 989, 1052-53 (1978) (discussing *Coker*). See also *Bordenkircher v. Hayes*, 434 U.S. 357, 370-71 (1978) (dissenting opinion), in which Justice Powell by negative implication suggests that a prosecutor can abuse even the broad discretion he is given in deciding whether certain offenses justify an indictment under a habitual offender statute.

Most recently, in *Coker* . . . , the Court refined the test for assessing Eighth Amendment challenges, concluding that

"a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Id.* at 592.

In holding the Georgia death penalty for rape invalid on the latter ground, the Court followed the approach of *Weems*, focusing on [(1)] *the character of the crime*, [(2)] *the punishment for the same offense in other jurisdictions*, and [(3)] *the penalty for similar crimes in the same jurisdiction*.

The en banc opinion, while conceding the validity in theory of both the excessiveness principle and the *Coker* test, see 587 F.2d at 655, emasculates the principal by applying the test improperly in practice.

A. Nature of the Penalty

In comparing the seriousness of the offenses with the harshness of the penalty, the en banc opinion discounts the length of Rummel's sentence by the probability of parole based on Texas' liberal system of awarding good time

Both federal and state courts have generally interpreted *Weems* as establishing the rule that excessive sentence length alone may render a punishment unconstitutionally cruel. Katkin, *Habitual Offender Laws: A Reconsideration*, 21 Buffalo L. Rev. 99, 117 & cases cited at n.82 (1971); Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 Buffalo L. Rev. 783, 831-35 (1975) (discussing cases); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635, 640 (1966); Brief for Petitioner at 34 n.30, *Coker v. Georgia*, 433 U.S. 584 (1977).

credits, *id.* at 657-59, and considers *only* the constitutionality of an undefined, possibly lesser sentence, while ultimately conceding that "if the court is forced to assume that Rummel's sentence is automatically and invariably one for his natural life, then the majority's assertion [that Rummel's sentence is grossly disproportionate to Rummel's offenses] is probably accurate," *id.* at 659. Thus, if the en banc court had viewed Rummel's sentence as the term he actually received, it probably would have decided the case differently.

Accumulation of good time credit is useless to someone given a life sentence, as pointed out numerous times by the dissent, *see, e.g., id.* at 666, except with respect to determining when one first becomes eligible for parole consideration.⁴ Further, as a quote in the en banc opinion points out, "Texas . . . gives the longest sentences and is the most reluctant [State in the country] to grant parole." *Id.* at 658. Moreover, parole is a matter of executive grace not protected by due process. *Accord, id.* at 666-71; *see Carmona*, 47 U.S.L.W. at 3461. And the Parole Board's decision will depend largely on Rummel's behavior in prison, not the offenses for which he was sentenced. *Rummel*, 587 F.2d at 668-69. The en banc opinion treats a trusty's eligibility for parole after serving twelve years not only as a guarantee of parole but also as a guarantee of complete freedom, *id.* at 658, 660; *cf. id.* at 659 n.19, which it is not.⁵

⁴ Thus, the majority's example, 587 F.2d at 660, of two states — one that gives a fixed ten-year sentence and one that assesses a thirty-year sentence with good time credit that makes actual time served only ten years — breaks down when applied to a prisoner given a life sentence, since no amount of good time credit discharges completely a life sentence.

⁵ See *id.* at 666, 669, 670 (dissenting opinion); *cf. Jones v. Cunningham*, 371 U.S. 236, 241-43 (1963) (holding that a state prisoner placed on parole is "in custody" within the meaning of the habeas corpus statute because of "significant restraints" on a parolee's

Moreover, if a life sentence without possibility of parole for three petty, nonviolent offenses would probably be unconstitutional, as the majority apparently concedes, then surely the added "crime" of a "bad attitude" in prison, virtually guaranteeing rejection of a prisoner's parole application and assuring him of lifetime imprisonment, should not make the sentence any less constitutionally infirm. *Cf. id.* at 668-69. After all, no one would argue that a "bad attitude" makes more acceptable an otherwise unconstitutionally cruel method of torture or death, even if a "good attitude" carried with it the possibility of a reprieve.

B. Character of the Crime

Although the en banc opinion concedes that proportionality analysis requires consideration of the nature of the offense, it then refuses to consider the nature of the underlying offenses for which the habitual statute mandated Rummel's life sentence on the grounds that (1) the sentence was imposed for the commission of *any* three separate and distinct felonies, irrespective of the nature of those felonies, and (2) because Rummel has demonstrated that he cannot conform to society's rules, Texas has justifiably branded him a habitual criminal and accordingly

liberty). The en banc opinion attempts to demonstrate that the mandatory maximum ten-year sentence that Georgia courts must assess a habitual offender whose last offense is theft is "approximately the same" as Rummel's life sentence because Rummel *might* be paroled in twelve years *if* (and only if) (1) he remains a trusty during that period and (2) the Parole Board chooses to grant parole. *Id.* at 660. But Georgia assesses a mandatory maximum of ten years for theft only on someone convicted four times and only if the fourth offense was committed after the third conviction, so that Rummel could not be sentenced under that provision of Georgia law. Further, even if he is eventually paroled, Rummel's lifetime of restrictions can hardly be dismissed as insignificant when compared to the *unconditional* release after ten years that a Georgia convict would receive for the same crimes.

imprisoned him for life, subject only to the Parole Board's exercise of its virtually unfettered discretion to parole him if he behaves. *Id.* at 659. But the issue is *not* whether Texas can classify Rummel a habitual offender or enhance his punishment, which Rummel concedes, but whether Texas can enhance the punishment by so much for so little.⁶ By refusing to consider the nature of the underlying offenses, the majority opinion converts Rummel's as-applied challenge into a *per se* challenge, treats a life sentence for petty offenses identically to the manner in which it would treat a life sentence for three heinous, violent crimes, and in effect precludes any as-applied challenge to the habitual statute, regardless of the triviality of the offenses, so long as those offenses are punishable as criminal. Under the majority decision as written, if the State can punish a

⁶ The majority opinion challenges Rummel's assertion that his offenses are more trivial than most others and asks "by what authority does Rummel denigrate [sic] the interest society has in punishing his crimes?" *Id.* at 662 n.29. But Rummel does *not* challenge the State's right to punish him; he questions *only* its right to include his petty crimes in the category of offenses for which a *life* sentence *automatically* applies. Moreover, it would be difficult to find three felonies any less serious than Rummel's. Compare Tex. Penal Code § 31.03(d) (4)(A) (1974) (making pig theft a felony, regardless of value); Tex. Rev. Civ. Stat. Ann. art. 6071l-2 (1977) (making felonies the second and subsequent convictions for driving while intoxicated). To characterize crimes involving potential violence as significantly more serious than non-violent property offenses can be justified on the ground that, almost without exception, crimes involving great danger to the physical well-being of others carry the severest sentences. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 862 & n.7 (1972); see, e.g., Comment, *Texas Sentencing Practices: A Statistical Study*, 45 Tex. L. Rev. 471, 482-83, 491-93 (1967) (statistically demonstrating such a relationship between convictions for violent crimes and assessed term of incarceration in Texas, except for a wide disparity between the expected sentence (approximately ten years) upon conviction for a third nonviolent property felony if sentenced under article 63 and the life sentence mandated by that statute).

trivial traffic offense as a crime, then it can punish the third commission of such an offense with a life sentence.

As the panel opinion points out, 568 F.2d at 1198, none of these offenses, singly or in sum, justify a severe penalty. None involved violence, the threat of violence, danger to person or property, skill in crime, use of sophisticated implements of crime, possession of lethal weapons, or other indicia of potential harm to the social order.⁷

C. Punishment for Same Offense in Other Jurisdictions⁸

Rummel could not receive a mandatory life sentence for his three offenses in any other state, save possibly

⁷ Commentators uniformly condemn the imposition of a life sentence for comparatively petty offenders, even incorrigible ones, as offensive to universal standards of decency. See e.g., Katkin, *Habitual Offender Laws: A Reconsideration*, 21 Buffalo L. Rev. 99, 120 (1971); Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071 (1964). Theft in particular is usually rated one of the least serious crimes because it is not an offense that "threatens the underpinnings of the social order." Wechsler, *Sentencing Innovations in Sentencing Institute: Violence Today — A Judicial Concern*, 46 F.R.D. 497, 524-25 (1968). See also *Bordenkircher*, 434 U.S. at 371 (Powell, J., dissenting) (commenting on limited adverse societal implications of \$88.00 check forgery); *Hart*, 483 F.2d at 141 (such harsh treatment of petty offenders is both illogical and impractical).

⁸ Rummel filed in the en banc court a Second Supplemental Appendix containing the following charts:

(1) Table 1, which lists for each state and territory (and under federal law) in reverse chronological order the maximum punishment prescribed by each habitual offender statute in effect during the last 200 years;

(2) Tables 2-4, which categorize, total, and list — by length and type of punishment and number and type of triggering offenses — the federal, state, and territorial jurisdictions with habitual offender statutes at each five-year interval since 1900;

(3) Table 5, which lists every state that has ever enacted a recidivist statute mandating a life sentence, gives the years during which each statute applied, and describes each statute and its successor;

one.⁹ Moreover, Texas, which has punished third-felony offenders with a mandatory life sentence for 123 years, *see Tex. Laws 1856, Paschal, Digest of Texas Laws*, art. 2464 (1866), has ignored a clear, 50-year trend in recidivist statutes away from mandatory life sentences for repeaters committing any felonies¹⁰ toward lighter and discretionary

(4) Table 6, which divides into the same categories employed in Tables 2-4 all habitual offender legislation currently in effect; and

(5) Table 7, which lists every reported habitual offender case in the Texas Court of Criminal Appeals since 1965, grouping first all cases involving prisoners with convictions for three or more violent crimes, in descending order according to degree of potential violence.

Table 7 was updated in Rummel's Fourth Supplemental Brief at 10-11 n.9.

Subsequent references in this Petition to the laws of other states are based on these tables and can be verified there.

⁹ In that one state, Washington, which has a similar statute, the state supreme court has indicated that it probably would not permit application of the statute in a case like Rummel's. *See State v. Lee*, 558 P.2d 236, 240 n.4 (1977). *Hart* limited to violent crimes West Virginia's law requiring a life sentence after any three felony convictions. Every other state habitual offender statute requires commission of more offenses or at least one violent crime, imposes a sentence substantially less than life, or grants discretion to the sentencing authority.

The en banc opinion's suggestion that (1) six states might sentence Rummel automatically to a life term and (2) judges and juries in eleven states might have discretion to give him a life sentence, 587 F.2d at 659-60, is inaccurate for the following reasons: (1) it incorrectly equates discretionary and mandatory sentences, (2) it considers an alleged fourth felony conviction that does not appear in the record and is irrelevant in any event since it was not one of the offenses named in Rummel's indictment, and (3) it misconstrues eight state statutes that could not apply to Rummel, because of either the nature of his offenses, when they occurred, or both.

¹⁰ Seventeen other states have "experimented" with mandatory life sentences for any felonies, apparently concluded that such a harsh penalty is either ineffective, counterproductive, or inhumane, and revised their laws by either (1) making the sentence discretionary [9 states], (2) limiting the statute's application to violent felonies [1 State], (3) both (1) and (2) [3 States], (4) reducing the mandatory sentence to a term less than life [2 States], (5) both (1) and (4) [1 State], or (6) repealing the statute entirely [1 State].

sentences and a violent-crime limitation. And it appears that no other western nation punishes recidivists as severely as Texas does.¹¹

D. Punishment for Other Offenses in Texas

Only capital murder is punishable by a mandatory life sentence (or death) in Texas. *See Tex. Penal Code Ann. § 19.03* (1974). Every other felony, including many violent crimes, are punishable by sentences that are either much less than life imprisonment or discretionary. *Rummel*, 568 F.2d at 1199 & nn. 10-11. And since 1974, Rummel's last offense has carried a maximum sentence of only *one year*, even for a person with two prior felony convictions.¹²

¹¹ Compare Timasheff, *The Treatment of Persistent Offenders Outside of the United States*, in 40 J. Crim. L. & Criminology 455, *passim* (1940); Tappan, Book Review, 65 Harv. L. Rev. 1092, *passim* (1952).

¹² If Rummel's trial for theft by false pretext had ended after January 1, 1974, and Rummel had requested assessment of punishment under the new Penal Code, *see Tex. Penal Code Ann., Savings Provision § 6(c)* (1974), his offense would have been only a misdemeanor, *id. § 31.03(b)(1), (d)(3)* (raising from \$50.00 to \$200.00 the minimum amount necessary to constitute a felony); *see id. § 31.02* ("theft" as defined in section 31.03 includes the offense previously called "theft by false pretext"), carrying a maximum punishment of only one year in prison and a \$2,000.00 fine, *id. § 12.21(2)*. Even under the new Penal Code's habitual misdemeanor statute, *id. § 12.43(a)*, which applies to anyone on trial for a Class A misdemeanor who has a prior felony conviction, Rummel's prison term could not exceed one year.

This reduced sentence highlights both the relatively trivial nature of the offenses, compare *Hart*, 483 F.2d at 138 n.1, and the public's increasingly more sophisticated enlightenment concerning incarceration and treatment of habitual offenders, *see Weems*, 217 U.S. at 378 (the cruel and unusual punishment clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice") (*quoted in Furman*, 408 U.S. at 242 (Douglas, J., concurring)).

The en banc opinion rejects Rummel's comparison of the punishment for various single offenses in Texas with the life sentence he received for three petty offenses on the ground that the sentence resulted from Rummel's status as a habitual criminal, not from the commission of any one offense. 587 F.2d at 660. But Rummel's status is based in part on the nature of each offense (*i.e.*, all must be felonies), and surely no one would dispute that Rummel's repetitive but petty, cheating conduct causes less societal harm than the commission of one rape, kidnapping, or murder.

E. Imposition of Severe Punishment Without Furthering Any Legitimate Penal Purpose

After rejecting Rummel's claim that his life sentence is grossly disproportionate to his crimes, the en banc opinion refuses to consider the statutory purposes of the Texas recidivist law, *id.* at 661,¹³ even though *Coker* makes clear that a punishment may be excessive if it fails to serve any legitimate penal goal, 433 U.S. at 592; *see id.* n. 4 (the converse applies).¹⁴

Every conceivable legislative purpose behind the life sentence as applied to Rummel—isolation, deterrence, rehabilitation, and retribution—is undermined by the statute or could be served equally as well by a substantially

¹³ The en banc opinion rejects the "lack of necessity test" based on the fear that the State could never prove that a sentence of one length deters more effectively than a shorter sentence. 587 F.2d at 661 (quoting Wheeler, *Toward A Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia*, 25 Stan. L. Rev. 62, 77-78 (1972)). But this criticism fails to recognize that the burden is on the petitioner to prove that the punishment imposed is excessive, not on the State to prove that it is not.

¹⁴ Compare *Furman*, 408 U.S. at 279 (Brennan, J., concurring) (pointing out that the standard as expressed in *Coker* incorporates the standard as expressed in *Hart*). *See also id.* at 300, 311, 331 (views of Justices Brennan, White, and Marshall, respectively, on the need for a "least drastic means" test).

shorter sentence for such petty offenses. First, studies consistently reveal that recidivist laws fail to isolate the true threat to the social order—the professional, dangerous criminal—who either (1) escapes detection or conviction and thus has no prior record upon which to base a habitual charge or (2) receives such a long sentence upon first or second conviction that the enhanced sentence for a third conviction is unnecessary. *See Third Supplemental Brief of Petitioner-Appellant* at 25-26 nn.25-28, *Rummel v. Estelle*, 587 F.2d 651 (5th Cir. 1978) (citing numerous studies). By the time most petty thieves are imprisoned as habitual criminals, their propensity toward criminal activity has declined with age and maturity. *Id.* at 26 n.30. Moreover, life imprisonment far exceeds the sentence normally imposed on others with similar convictions but not charged as habituals. *Id.* at 27 n.31; *cf. id.* n.32; note 6 *supra*.

Second, a habitual law that punishes murderers and forgers alike does not deter crime, *see id.* at 27-28, and may even encourage a petty repeat offender to commit more serious crimes in order to avoid severe punishment for the minor offense, *id.* at 28. Third, experts and common sense repudiate the notion that the prospect of either permanent incarceration or long-term confinement followed by lifetime parole with no possibility of complete freedom serves a rehabilitative function, especially when it has twice failed. *See id.* at 29 & n.39. Fourth, retribution, even if a legitimate penal goal, cannot justify a penalty far exceeding the severity of the offenses for which it is assessed. Finally, studies reveal that judge, jury, and prosecution nullification combine to ensure that indiscriminately harsh habitual offender statutes advance no coherent policy. *See id.* at 30-34.

F. Rational Basis Test

The en banc opinion demands that a punishment, to be unconstitutionally disproportionate, can have "no rational

basis." 587 F.2d at 655-56, 661-62. This burden is an impossible one to discharge, since the opinion refuses to examine the nature of the underlying offenses, *see id.* at 659; and it is inappropriate for Eighth Amendment analysis, since even the most reprehensible torture has *some* rational basis as retribution or deterrent. Moreover, the "rational basis" standard has *no* support in this Court's Eighth Amendment decisions, which require *at most* that the courts give *deference* to the legislative judgment, *see, e.g., Gregg*, 428 U.S. at 175 (Stewart, Powell & Stevens, JJ., plurality opinion). The disproportionality test is separate from and independent of the rational basis test.¹⁵ And Rummel has satisfied even this burden. That the statute may be rational when applied to those committing at least one violent offense does not justify the law's application to Rummel.

3. THE EIGHTH AMENDMENT ISSUE RAISED IN THIS CASE IS ONE OF FIRST IMPRESSION THAT REQUIRES CLARIFICATION BY THIS COURT BECAUSE OF CONFUSION IN THE LOWER FEDERAL AND STATE COURTS CONCERNING THE APPROPRIATE STANDARDS BY WHICH TO EVALUATE WHETHER A LENGTHY SENTENCE IS UNCONSTITUTIONALLY DISPROPORTIONATE.

This court has not previously addressed the issue whether a lengthy sentence automatically imposed for

¹⁵ See *Coker*, 433 U.S. at 592-93 n.4 (White Stewart, Blackmun & Stevens, JJ., plurality opinion) (*emphasis added*):

Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment *even though it may* measurably serve the legitimate ends of punishment and therefore it is not invalid for its failure to do so.

See also *id.* at 592; *Imprisoned Citizens Union v. Shapp*, 451 F. Supp. 893, 895 (E.D. Pa. 1978) (pointing out that a punishment violates the Eighth Amendment if it *either* (1) shocks the conscience, (2) is grossly excessive, or (3) is not rationally related to legitimate penological goals).

relatively trivial offenses can violate the Eighth amendment solely because of length. In *Carmona* this Court refused to review lengthy sentences given for drug offenses, an area in which legislatures have traditionally determined, either directly or by implication, that the offender is part of a system that spawns violent crime and threatens the social fabric. But this case involves no such legislative determination, as starkly illustrated by the disparity between the life sentence Rummel received in April 1973 and the present one-year maximum. *See note 12 supra* & accompanying text.

Although not occurring often enough in Texas to create the flood of litigation that the court below apparently fears, the imposition of a life sentence on a three-time petty offender has occurred, on the average, at least once every other year in Texas since 1965,¹⁶ at least one additional instance in Texas in the last few months,¹⁷ and at least once recently in Indiana,¹⁸ and possibly Tennessee.¹⁹

Moreover, each new lower federal and state court decision on this issue reflects confusion among those courts

¹⁶ Only 7 of the 363 habitual offenders (.0193) who have received a life sentence in reported cases in the Texas Court of Criminal Appeals since 1965 have committed three nonviolent, petty property crimes (*i.e.*, certain thefts, forgeries, embezzlements, shopliftings, or some combination). This is no flood, just a trickle.

¹⁷ See *State v. Guerrero*, No. 78-CR-538 (Bexar County Dist. Ct. entered Nov. 1, 1978) (certified copies of (1) the indictment and jury verdict, reflecting a conviction for forging a \$22.50 check and prior convictions for forging a \$123.10 check and child desertion (second offense) and (2) the judgment, reflecting a life sentence, are included in Appendix C for the Court's convenience).

¹⁸ *McMahan v. State*, 382 N.E.2d 154 (Ind. 1978) (life sentence for three forgery convictions).

¹⁹ *Glasscock v. State*, 570 S.W.2d 354 (Tenn. Crim. App. 1978), *petition for cert. filed*, 47 U.S.L.W. 3485 (U.S. Nov. 29, 1978) (No. 78-861) (life sentence after conviction for grand larceny).

concerning the appropriate criteria by which to judge lengthy sentences for excessiveness, both in terms of the general excessiveness principle²⁰ and its application.²¹

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

SCOTT J. ATLAS

VINSON & ELKINS

2100 First City National
Bank Building
Houston, Texas 77002
(713) 651-2024

Counsel for Petitioner

Of Counsel

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

March 10, 1979

²⁰ Compare, e.g., *In re Lynch*, 503 P.2d 921, 930 (Cal. 1973) (en banc) (citing cases in Kentucky, Oregon, Michigan, and Alaska, each employing a different formulation of the general principle); and cases cited in *Rummel*, 568 F.2d at 2044-45 n.6 (panel opinion), with *United States v. Washington*, 578 F.2d 256, 258 (10th Cir. 1978) (a sentence within statutory limits cannot be challenged as cruel and unusual); *Smith v. United States*, 273 F.2d 462, 468 (10th Cir. 1959) (same); and *O'Donnell v. State*, 326 So. 2d 4, 5-6 (Fla. 1975) (same), and with *State v. Myers*, 570 P.2d 1252, 1264 (Ariz.) (en banc) (no discernible test); and *Green v. Commonwealth*, 556 S.W.2d 684, 687 (Ky. 1977) (same).

²¹ Compare, e.g., *Carmona*, 47 U.S.L.W. at 3461-62 & n.12 (discussing California and New York cases, which evaluated Eighth Amendment claims based on the maximum possible terms, irrespective of the possibility of parole); and *Pickard v. State*, 585 P.2d 1342, 1344 (Nev. 1978) (no consideration of possibility of parole), with *People v. Lorentzen*, 194 N.W.2d 827, 831, 834 (Mich. 1972) (test is the minimum possible punishment); and *State v. Mitchell*, 563 S.W. 2d 18, 27 (Mo. 1978) (en banc) (same).

Supreme Court, U. S.

FILED

MAR 19 1979

MARK L. BODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. **78-6386**

WILLIAM JAMES RUMMEL, Petitioner,

v.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF
CORRECTIONS, Respondent.

A P P E N D I X

SCOTT J. ATLAS
Vinson & Elkins
2100 First City National
Bank Building
Houston, Texas 77002

Of Counsel

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

Counsel for Petitioner

March 10, 1979

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1a

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. COURT OF APPEAL
FILED

NO. 76-2946

MAR 9 1979

WILLIAM JAMES RUMMEL,

EDWARD W. WADSWORTH
CLERK

Petitioner-Appellant,
versus

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the
Western District of Texas

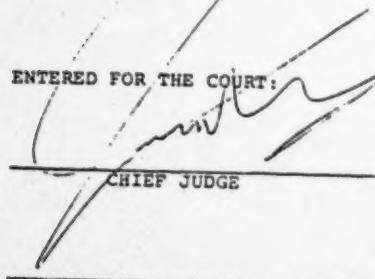
ON PETITION FOR REHEARING

(March 9, 1979)

Before BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD,
CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE,
Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed
in the above entitled and numbered cause be and the same is
hereby Denied.

ENTERED FOR THE COURT:

CHIEF JUDGE

*Judge Thornberry was a judge in regular active service on the
en banc court when the decision in this cause was rendered.
Subsequently Judge Thornberry took Senior Status. On
October 20, 1978 the Omnibus Judgeship Bill, Public Law 95-486
(95th Congress) was approved. Judge Thornberry did not
participate in this decision.

2a

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

TEL 504-589-6514
800 CAMP STREET
NEW ORLEANS, LA. 70130

December 20, 1978

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 76-2946 - WILLIAM JAMES RUMMEL vs. W.J. ESTELLE, JR.,
Director, Texas Dept. of Corrections

Dear Counsel:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, F.R.A.P., govern costs, petitions for rehearing and mandates, respectively. A petition for rehearing must be filed in the Clerk's Office within 14 days from this date. Placing the petition in the mail on the 14th day will not suffice.

Local Rule 17 provides that "A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to Local Rule 7 which provides: "Appointed counsel shall, in the event of affirmance or other decision adverse to the party represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Place & Initials
Deputy Clerk

enc.

cc: Mr. Scott J. Atlas ✓
Mr. Dunklin Sullivan
Mr. Gilbert J. Pena
Mr. Keith W. Burris
Messrs. Harry J. Schulz, Jr.
Henry Wade

RECEIVED

DEC 22 1978

S.J.A.

RUMMEL v. ESTELLE

3108

William James RUMMEL
Petitioner-Appellant.

v.

W. J. ESTELLE, Jr., Director, Texas
Department of Corrections,
Respondent-Appellee.

No. 76-2946.

United States Court of Appeals,
Fifth Circuit.

Feb. 21, 1979.

State prisoner sought writ of habeas corpus. The United States District Court for the Western District of Texas, Dorwin W. Suttle, J., denied relief, and petitioner appealed. A panel of the Court of Appeals, 568 F.2d 1193, held that a life sentence that had been imposed under the Texas habitual criminal statute violated the Eighth Amendment. On rehearing en banc, the Court of Appeals, 587 F.2d 651, held that even as applied to petitioner, the Texas habitual criminal statute did not amount to cruel and unusual punishment, and remanded to the panel for a determination of petitioner's contention that he was denied effective assistance of counsel. On remand, a panel of the Court of Appeals held that petitioner's allegations were sufficient to raise a question as to whether an appointed attorney discharged his duty to interview potential witnesses and make an independent examination of the facts and where the issue had not been resolved after a full hearing by Texas court, a federal evidentiary hearing was required.

Vacated in part and remanded with directions.

Synopsis, Syllabi and Key Number Classification
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The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

RUMMEL v. ESTELLE

3109

attorney had been informed by petitioner.

5. Habeas Corpus — 25.1(6)

Fact that petitioner knew only where alleged potential witnesses worked, rather than their names, and did not conduct his own investigation while free on bail before his attorneys were appointed was not necessarily fatal to plea for habeas corpus relief based on allegation that attorney who was appointed approximately one month before trial did not conduct an independent pre-trial investigation into the factual basis for the state's charges and neglected to seek out and interview witnesses about whom the attorney had been informed by petitioner.

6. Criminal Law — 641.13(1)

Each case involving the constitutional issue of effectiveness of counsel depends on the specific conduct of the parties involved.

Appeal from the United States District Court for the Western District of Texas.

Before THORNBERRY, GOLDBERG and CLARK, Circuit Judges.

PER CURIAM:

This court en banc has disposed of petitioner's assertion that his sentence violated the eighth amendment. The responsibility for determining Rummel's second contention that he was denied effective assistance of counsel for his defense has been remanded to the panel. 587 F.2d 651 at 662.

Two attorneys represented Rummel in connection with the state charges. The first was appointed approximately one month prior to the trial, and the second, whose effectiveness is not challenged,

was appointed on the date of the trial to assist the first. Rummel asserts that his first appointed attorney failed to conduct an independent pre-trial investigation into the factual basis of the state's charges and neglected to seek out and interview witnesses whose testimony the petitioner had informed him would buttress his defense. These allegations are not contradicted in the record, and it cannot be said that, assuming they are true, the petitioner is entitled to no relief as a matter of law.

[1-5] A criminal defendant has the right to be represented by counsel "reasonably likely to render and rendering reasonably effective assistance." *Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir. 1974), quoting *Mackenna v. Ellis*, 280 F.2d 592, 599 (5th Cir.), cert. denied, 388 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1960). Since "investigation and preparation are the keys to effective representation," ABA Projects on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function 224 (App. Draft 1971), court-appointed counsel have a duty to interview potential witnesses and "make an independent examination of the facts, circumstances, pleadings and laws involved." *Von Moltke v. Gillies*, 332 U.S. 708, 721, 68 S.Ct. 316, 322, 92 L.Ed. 309, 319 (1948). See *Pennington v. Beto*, 437 F.2d 1281 (5th Cir. 1971); *United States v. Decoster*, 159 U.S.App.D.C. 326, 333, 487 F.2d 1197, 1204 (1973), appeal after remand — U.S.App.D.C. —, — F.2d — (1976), opinion vacated and rehearing en banc granted, — F.2d — (1977); *McQueen v. Swenson*, 498 F.2d 207, 217 (8th Cir. 1974). Rummel's allegations are sufficient to raise the issue whether his attorneys discharged this responsibility. The fact that they performed other tasks required of them —

RUMMEL v. ESTELLE

3110

such as interviewing their client and cross-examining witnesses for the prosecution—obviously is not dispositive. Nor is the fact that Rummel knew only where the potential witnesses worked, rather than their names, and failed to conduct his own investigation while free on bail before his attorneys were appointed, necessarily fatal to his plea for habeas corpus relief.

[6] As we noted in *King v. Beto*, 429 F.2d 221, 222, n. 1 (5th Cir. 1965), cert. denied, 401 U.S. 936, 91 S.Ct. 921, 28 L.Ed.2d 216 (1971), "each case involving the constitutional issue of effectiveness of counsel depends on the facts—the specific conduct of the parties involved." Here the factual development necessary for a just determination of the merits of Rummel's petition is lacking. An examination of the record indicates that, among others, the question whether

VACATED IN PART AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED

JUL 14 1976

DAN W. BENEDICT, CLERK

BY

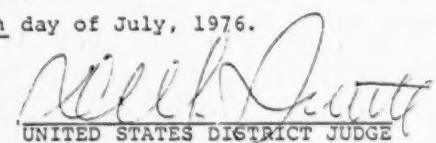
Deputy

WILLIAM JAMES RUMMEL)
VS.) SA-76-CA-20
W. J. ESTELLE, JR., DIRECTOR)
TEXAS DEPARTMENT OF)
CORRECTIONS)

ORDER DENYING PETITIONER'S MOTION FOR
RECONSIDERATION

After reviewing the file in the present case, together with the Petitioner's Motion for Reconsideration filed June 2, 1976, the Court finds no new arguments or authorities not previously raised by the Petitioner and considered by the Court that would warrant the reconsideration and reversal of the Court's decision rendered May 14, 1976, denying the Petitioner's application for habeas corpus relief. The Petitioner's Motion for Reconsideration is, according, DENIED.

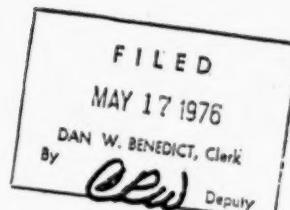
SO ORDERED this the 14th day of July, 1976.



UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

WILLIAM JAMES RUMMEL
VS.
W. J. ESTELLE, JR., Director,
Texas Department of Corrections



SA 76 CA 20

JUDGMENT

This action came on for consideration before the Court, Honorable D. W. Suttle, United States District Judge, and the issues having been duly considered and the Court having rendered a decision on May 14, 1976, denying Petitioner's application for habeas corpus relief,

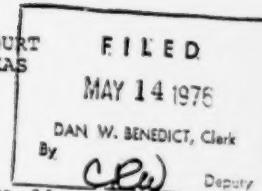
It is, therefore, ORDERED AND ADJUDGED that the petition for writ of habeas corpus is denied and this cause is terminated.

DATED at San Antonio, Texas, this 17th day of May, 1976.

DAN W. BENEDICT, CLERK
UNITED STATES DISTRICT COURT

By: *Carolyn Wright*
Deputy U.S. District Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION



WILLIAM JAMES RUMMEL
VS.
W. J. ESTELLE, JR., Director
Texas Department of Corrections

SA-76-CA-20

ORDER DENYING PETITION FOR HABEAS CORPUS RELIEF

Petitioner, William James Rummel, was convicted in the 187th District Court of Bexar County, Texas, after his plea of not guilty upon the charges of theft of property over the value of \$50.00 by false pretext. Two prior convictions were proven in his record, and he was sentenced to life imprisonment. Upon appeal, Petitioner's conviction was affirmed by the Texas Court of Criminal Appeals. See Rummel v. State, 509 S.W.2d 630.

In the present Petition the Petitioner raises the following points of alleged error by the trial court:

- (1) Ineffective counsel, and
- (2) Harsh, cruel, and unusual punishment.

Neither of these points were raised upon appeal, but each was raised in a petitions for habeas corpus in the trial court. In this connection, the trial judge filed findings of fact and conclusions of law, and found that the application was without merit and should be denied. Texas Court of Criminal Appeals followed this recommendation and denied the Petitioner's application without written order. Therefore, the Court finds that the Petitioner has exhausted his State court remedies pursuant to provisions of 28 U.S.C. §2254(b).

After reviewing the record in the present case together with the transcript of State court proceedings, the Court finds that upon a showing of indigency the Petitioner was first appointed Mr. William B. Chenault, III, as counsel one month before his trial. Thereafter, on the day of trial, the Petitioner was appointed a second attorney at his own request,

who was directed to assist his first appointed counsel. The Petitioner complains that Mr. Chenault made no pretrial motions, no independent investigation of his case, did not know the names of the State's witnesses, and failed to call any witnesses on the Petitioner's behalf. Petitioner was released on bail some two weeks after his arrest and at least four months before Chenault was appointed to represent him. The Petitioner admitted knowing none of the names of the witnesses whom he contends that his attorney, Mr. Chenault, should have called to testify on his behalf, except for the complaining witness, Shaw. Chenault's co-counsel obtained an instrument from Mr. Shaw entitled "Release and Non-prosecution Statement." The instrument had first been the subject of a Motion in Limine by the State at the commencement of the trial, which Motion was granted and Chenault was instructed not to attempt to introduce it. Nevertheless, prior to the hearing on punishment at the conclusion of the trial, Chenault sought permission to offer it in evidence, but such permission was denied. As observed by the Appellate Court, Shaw's testimony was factual and expressed no opinion concerning the appellant's guilt, and the instrument was not admissible for impeachment purposes. Shaw's prior testimony given to the attorneys was not inconsistent with any material testimony he gave at the trial. As to the Petitioner's complaint that other "witnesses" were not called and that Mr. Chenault did not know their names, but knew where they worked, the Court finds that the Petitioner was at liberty on bail for many months before his attorneys ever had the opportunity to look into the matter of possible helpful evidence, and evidently made no effort to do so.

Although the trial judge held no evidentiary hearing, he prepared a remarkably detailed set of findings and conclusions which appear in the transcript. It shows that among

other things, Mr. Chenault obtained a continuance on the Petitioner's behalf, discussed the case with Petitioner at the jail on at least three occasions, examined the State's file, communicated with the Petitioner's parents by telephone and letter, intensively cross-examined witnesses of the State, moved for an instructed verdict, objected to the Court's charge and submitted requested instructions, one of which was granted by the Court, and attempted to impeach the complaining witness by introduction of the above mentioned instrument.

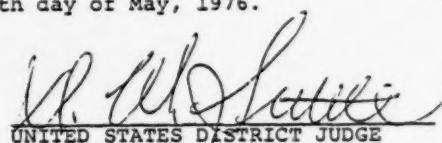
In the Petitioner's traverse, he cites the Fifth Circuit case of MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), which is the landmark case within the Fifth Circuit on the standard for effective counsel. In MacKenna, the Fifth Circuit stated that the right to effective counsel means not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. Id. at 599. Reviewing the transcript of State court proceedings in this case in light of the Fifth Circuit's standard in MacKenna, the Court finds that Petitioner's first contention is without merit.

The second and final point raised by the Petitioner, namely, that he was subjected to cruel and unusual punishment in violation of the Constitution, by reason of the jury's verdict of life imprisonment based upon the enhancement statute, is also without merit. It has been held that the Texas enhancement statute is Constitutional. See Spencer v. Texas, 385 U.S. 557 (1967). The Fifth Circuit has also followed the Spencer decision. Further, the argument advanced by the Respondent to the effect that a "life sentence" is nothing of the sort because State Parole law in regulation entitles a convict to release on

parole after he has served approximately twelve years, and even less if such prisoner is made a trustee, effectively answers any attack on this sentence as being cruel and unusual punishment forbidden by the Constitution. The Court finds Petitioner's second contention to also be without merit.

Therefore, for the reasons and authorities cited above, the Court finds that an evidentiary hearing is not warranted in this case, and that the Petitioner's application for habeas corpus relief should be and the same is hereby DENIED.

SO ORDERED this the 13th day of May, 1976.


W. W. Lattie
UNITED STATES DISTRICT JUDGE

44a

PETITIONER B. L. Williams APPLICATION NO. 3-1142

APPLICATION FOR WRIT OF Habeas Corpus

ACTION TAKEN:

application Denied Without Written Order on Findings of the Trial Court after Hearing.

Judge _____ Date _____

Application Denied Without Written Order on Findings of the Trial Court Without Hearing.

John J. M. Coughenour 9/25/75
Judge _____ Date _____

Application Denied Without Written Order and Without Prejudice as to Petitioner's Right to Apply to the Trial Court.

Judge _____ Date _____

Application Denied Without Written Order.

Judge _____ Date _____

Direct Appeal Pending - No Action Necessary.

Judge _____ Date _____

Application Denied With Written Order.

Judge _____ Date _____

File and Set for Submission.

JUDGE _____ DATE SUBMITTED _____ ADM. ASST. _____

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER THEREON

EX PARTE

WRIT NOS. 298 & 304 IN THE DISTRICT COURT

S 187TH JUDICIAL DISTRICT
WILLIAM JAMES RUMMEL S BEXAR COUNTY, TEXASO R D E R

Petitioner William James Rummel has filed in this Court two applications for post-conviction writ of habeas corpus. He alleges that he is illegally restrained for the following reasons: (1) He received ineffective assistance of counsel. (2) His life sentence imposed pursuant to Article 63, Vernon's Tex. P.C. (1925), is invalid because it violates the Eighth Amendment proscription against cruel and unusual punishment.

HISTORY OF THE CASE

On January 31, 1973, petitioner was indicted by the Bexar County Grand Jury for the offense of theft over the value of \$50 by false pretext in cause number 73-CR-214. Two prior convictions were alleged for enhancement purposes. On April 9, 1973, trial was held before a jury in the 187th District Court of Bexar County, the undersigned judge presiding. The jury found petitioner guilty as charged. At the punishment phase, the jury found that petitioner had been previously convicted as alleged in the indictment, and the Court, in accordance with Article 63, assessed punishment against petitioner at imprisonment for life in the Texas Department of Corrections. Not having filed a motion for new trial, petitioner was duly sentenced by the Court on April 26, 1973. Petitioner appealed his conviction to the Court of Criminal Appeals. On May 22, 1974, that Court affirmed the conviction and delivered its opinion signed by Commission Reynolds. Rummel v. State, 509 S.W.2d 630 (Tex. Cr. App. 1974).

FINDINGS OF FACT

The court has reviewed the records in petitioner's case and in connection with his application for writ of habeas corpus enters

051

the following findings of fact:

1. Petitioner was represented by attorney William B. Chennault, III, who was appointed by the Court on February 20, 1973.
2. Mr. Chennault was assisted in representing petitioner by another attorney, Harold Warford.
3. On March 5, 1973, the date originally set for trial, attorney Chennault moved for a continuance, which was granted by the Court. Trial was then set for April 9, 1973.
4. Prior to trial, attorney Chennault discussed the case with petitioner at the Bexar County Jail on February 22, March 6, and March 28, 1973. He also secured examination of the State's file and communicated with petitioner's parents by telephone and letter.
5. On the day of trial the Court denied attorney Chennault's request to withdraw as counsel for petitioner. Mr. Warford was permitted to act as co-counsel for petitioner.
6. At trial the testimony of the State's principal witnesses suggested that petitioner had attempted to perform his agreement with the complainant. Mr. Chennault proceeded to develop before the jury by extensive cross-examination the theory that the dispute between petitioner and the complainant was simply a contractual matter involving petitioner's failure to perform his part of the bargain. On this theory of the case, Mr. Chennault moved for an instructed verdict of acquittal when the State rested its case. The motion was overruled and denied by the Court. After both sides had closed, Mr. Chennault objected in writing to the Court's charge and submitted two written requested instructions, one of which was granted by the Court.
7. Petitioner's attorney also attempted to impeach the complainant during trial with a written release and non-prosecution agreement signed by the complainant a few days before trial. It appears that this instrument was obtained from the complainant by petitioner's parents with Mr. Warford's assistance.
8. At the punishment phase of the trial, petitioner pled "true" to both paragraphs of the indictment alleging prior convictions. The State introduced duly authenticated documentary

evidence which supported the jury's verdict that petitioner had been previously convicted as alleged in the indictment.

9. Petitioner by letter to this Court requested that Mr. Warford be appointed to represent petitioner on appeal. Mr. Warford was so appointed by this Court at the sentence hearing on April 26, 1973.

10. This Court finds that petitioner's appointed counsel, both at trial and on appeal acted effectively in his behalf.

11. No evidentiary hearing is deemed necessary.

CONCLUSIONS OF LAW

As matters of law, this Court concludes that:

1. Petitioner in his application has sworn to no fact which, if true, would render his judgment of conviction void and his confinement illegal.

2. Petitioner received effective assistance of court-appointed counsel. Petitioner was not entitled to errorless counsel or counsel judged ineffective by hindsight, but counsel who is reasonably likely to and who does render reasonably effective assistance.

3. This Court was under no duty or obligation to search for counsel until an attorney was found who was agreeable to petitioner.

4. Under the circumstances of this case, petitioner's life sentence is not so excessive or disproportionate as to constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

5. Petitioner is legally confined by virtue of a valid judgment and sentence in cause number 73-CR-214.

6. No evidentiary hearing is necessary.

7. Petitioner's application for writ of habeas corpus is without merit and should be denied.

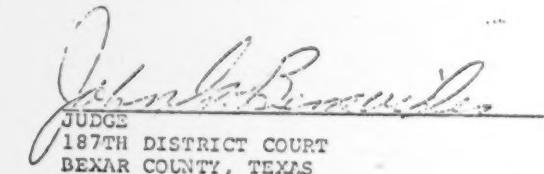
ORDERS OF THIS COURT

1. Petitioner's application for writ of habeas corpus is hereby denied.
2. The clerk of this Court shall:

(a) Transmit this ORDER with attachments to the Court of Criminal Appeals, sitting in Austin, Texas, in accordance with Article 11.07, Vernon's Ann. C.C.P.

(b) Send a copy of this ORDER with attachments to petitioner by depositing same in the U. S. Mail, postage prepaid, addressed to William James Rummel, TDC Inmate 238534, P. O. Box 1500, Retrieve Unit, Angleton, Texas 77515.

Entered this 25 day of July, A. D., 1975.


JUDGE
187TH DISTRICT COURT
BEXAR COUNTY, TEXAS

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mitted for its determination. We cannot conclude that the error was harmless.

The judgment is reversed and the cause remanded.



William J. RUMMEL, Appellant,

v.

The STATE of Texas, Appellee.

No. 48046.

Court of Criminal Appeals of Texas.

May 22, 1974.

Defendant was convicted in the 187th Judicial District Court, Bexar County, John G. Benavides, Jr., of theft by false pretext, and he appealed. The Court of Criminal Appeals, Charles L. Reynolds, C., held that evidence sustained conviction; and that prior verified statement of prosecution witness reciting that "I have knowledge of no facts upon which any criminal prosecution could be based" constituted mere expression of opinion that defendant was not guilty of theft by false pretext and was not admissible to impeach witness who did not express opinion at trial concerning guilt.

Affirmed.

1. False Pretenses C=49(6)

Evidence, including evidence that defendant obtained check payable to third person to purchase compressor for air conditioner and that defendant within 30 minutes of receipt converted check into cash which he appropriated to his own use and benefit, sustained conviction for theft by false pretext.

2. Criminal Law C=549

Hearsay testimony has no probative value.

3. Criminal Law C=371(3)

In prosecution for theft by false pretext, evidence of defendant's subsequent misrepresentations to third parties was material to establishment of defendant's initial intent to appropriate funds belonging to maker of check by false pretext.

4. Witnesses C=379(3)

Prior verified statement of prosecution witness reciting that "I have knowledge of no facts upon which any criminal prosecution could be based" constituted mere expression of opinion that defendant was not guilty of theft by false pretext and was not admissible to impeach witness who did not express opinion at trial concerning guilt.

5. Witnesses C=379(3), 383

Prior statement is not admissible for impeachment if it is confined to opinion that accused is not guilty or to other irrelevant matters.

6. Criminal Law C=847, 1038.1(3)

Acquiescence in and absence of an objection to form of charge with respect to punishment not only failed to preserve but waived any error.

7. Criminal Law C=884

Where defendant's two prior noncapital felony convictions were properly alleged and proved, punishment of life imprisonment was automatically fixed by law and there was no necessity for jury to assess punishment. Vernon's Ann.P.C. art. 63.

Harold L. Warford, San Antonio, for appellant.

Ted Butler, Dist. Atty. and Antonio Cantu, Fred Rodriguez and Douglas C.

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Cite as 509 S.W.2d 630

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Young, Asst. Dist. Atty., San Antonio, Jim D. Vollers, State's Atty., Austin, for the State.

OPINION

CHARLES L. REYNOLDS, Commissioner:

The conviction is for the offense of theft by false pretext. The punishment, enhanced by the jury's finding that appellant had two prior non-capital felony convictions, was assessed by the court at life imprisonment.

When the State closed its evidence on the issue of guilt, appellant moved for, and was denied, an instructed verdict, and this denial is the subject of the second ground of error. Since appellant primarily is complaining of the sufficiency of the evidence, it is appropriate to review the facts for that resolution.

Appellant did not testify and he presented no witness in his behalf. Except as otherwise indicated, the recitation of facts is from the testimony of two of the State's witnesses, David Lee Shaw, Sr., and Paul Ellis.

Shaw had leased Captain Hook's Lounge in San Antonio from Ellis. About noon on August 15, 1972, Shaw and Ellis were discussing extra air conditioning for the lounge. During the course of the conversation, appellant entered the lounge.

Ellis had a used air conditioning unit, with a bad compressor, which he offered to Shaw if Shaw wanted to buy a compressor for it. Appellant interrupted the conversation to state that he was an air conditioning repairman, and that he could get another compressor and install it.

When Shaw asked the cost, appellant replied that he would call Service Supply. Returning from the telephone, appellant said the compressor would cost \$120.75, and he would get it from Service Supply. An agreement was reached on the amount

of appellant's installation fee. It was further agreed that appellant would buy the compressor, get the air conditioning unit from another bar owned by Ellis, and meet Ellis the next morning at Captain Hook's Lounge where appellant was to put the compressor in the unit and install the complete unit.

Appellant asked for the money to buy the compressor. Shaw wrote his personal check made payable, at the suggestion of Ellis, to Service Supply in the sum of \$120.75, designating thereon that it was for "Air Conditioner Comp." Shaw delivered the check to appellant at approximately 2 p.m.

In delivering the check to appellant, Shaw believed that appellant wanted to fix the air conditioner. Shaw intended and believed that the proceeds were for the purchase of a compressor and he intended that Service Supply cash the check. He did not give appellant permission to cash the check and obtain the proceeds.

A short time after appellant left the lounge, he telephoned Shaw. He reported that Service Supply did not have the compressor, but that he could get one at Montgomery Ward Company through, as Shaw understood, Service Supply. Approximately one hour later, appellant called again. He told Shaw not to worry and that everything was all set, which Shaw took to mean that appellant had obtained the compressor.

On the same day, appellant appeared before Ada Wesch, collection teller at the bank on which Shaw's check was drawn. According to Mrs. Wesch, appellant said he was, or that he represented, Service Supply and wanted to cash Shaw's check. Mrs. Wesch refused to cash the check since appellant did not have an account with the bank. She advised that he go to his own bank. Appellant was insistent that she cash the check and she, having verified that Shaw had sufficient funds on deposit and that there was no stop payment order on the check, suggested that she could

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guarantee the money by issuing a cashier's check in exchange for Shaw's check. Appellant accepted the suggestion. He endorsed Shaw's check with the names Service Supply and William Rummel. He received the bank's cashier's check made payable to Service Supply in the same sum as, and in exchange for, Shaw's check.

It was the testimony of Mary Beth O'Brien, drive-in teller at the same bank, that at approximately 2:30 p. m. on the same day, a man, who stated he was, or that he represented, Service Supply, presented the cashier's check to her for cash. After viewing the man's picture on, and entering on the cashier's check the number of, the Texas driver's license presented to show that he was Mr. Rummel, and comparing the signatures on the license and the cashier's check endorsement, Miss O'Brien cashed the cashier's check. Mrs. Wesch testified that the endorsement on Shaw's check and the endorsement on the cashier's check were the same.

It was shown by Glen Richardson, one of the owners of Service Supply, that no one by the name of William Rummel ever worked for the company and that William Rummel was never authorized to cash checks for Service Supply.

Late the next day when Shaw had heard nothing further from appellant, he called Service Supply. He was informed that appellant had been there, but that the company could not sell to him since he was not an authorized dealer. Attempts by Shaw and Ellis to locate appellant proved fruitless. Ellis was told that appellant had gone by the bar where the air conditioning unit was located to look at it, but that it would not fit in the trunk of appellant's car.

Ellis thought that Shaw should stop payment on his check. On August 17, 1972, Shaw went to his bank to stop payment on his check, and he was told that his check had been cashed.

For three weeks, Ellis tried unsuccessfully to locate appellant, who did not return to the lounge nor contact either Shaw or Ellis. Approximately a month after the occurrence, Shaw lodged a complaint against appellant and, about a month later, Shaw sold his interest in the lounge. The record reasonably supports the inference that neither Shaw nor Ellis saw appellant again until the day of the trial.

[1]. The force of appellant's insufficient evidence argument is that, since Shaw believed appellant wanted to perform his undertaking and the evidence shows that appellant attempted to perform the agreement, the evidence illustrates, not a theft by false pretext, but only a subsequent failure by appellant to fulfill a contractual obligation. The fact that appellant subsequently failed to perform under his representation as to future events does not render the evidence insufficient, because a statement as to future happenings, if it is a false representation by which one is induced to part with his property, may form the basis of the offense of theft by false pretext. Hilliard v. State, 401 S.W.2d 814 (Tex.Cr.App.1966), cert. denied 385 U.S. 941, 87 S.Ct. 310, 17 L.Ed.2d 220 (1966), rehearing denied, 385 U.S. 1021, 87 S.Ct. 726, 17 L.Ed.2d 561 (1967).

The issue, then, is whether the evidence is sufficient to support the jury's verdict that appellant obtained Shaw's \$120.75 by a false pretext which induced Shaw to surrender his money. In considering its sufficiency, the evidence must be viewed in the light most favorable to the jury's verdict. White v. State, 478 S.W.2d 506 (Tex.Cr.App.1972); Jones v. State, 442 S.W.2d 698 (Tex.Cr.App.1969), cert. denied 397 U.S. 958, 90 S.Ct. 967, 25 L.Ed.2d 143 (1970).

In presenting the ground of error, appellant concedes that Shaw surrendered his money on the belief that appellant wanted to perform as he represented he would. Thus, if the evidence sufficiently shows

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that appellant's ostensible reason—i. e., to buy the compressor preparatory to repairing the air conditioning unit—concealed his true intent—i. e., to wrongfully take Shaw's money—the offense of theft by false pretext was complete.

[2]. Notwithstanding the hearsay testimony that appellant had been to Service Supply and had gone to look at Ellis' air conditioner,¹ the jury was entitled to credit with probative weight the evidence that appellant neither negotiated the check to the named payee nor returned it if he was not allowed to buy at Service Supply, but instead, by asserting that he was authorized to cash the check, converted it into cash within thirty minutes of its receipt and, never again contacting Shaw, without consent appropriated the cash to his own use and benefit. These actions by appellant, considered with the surrounding circumstances, were justification for the jury's conclusion that appellant's representations that he would buy the compressor with the check and thereupon repair and install the air conditioning unit were false, and that appellant had the intent to wrongfully take Shaw's money and appropriate it to his own use and benefit at the very time he made the false representation. Being properly charged in the matter, the jury's conclusion on the facts is final. Johnson v. State, 144 Tex.Cr.R. 392, 162 S.W.2d 980 (1942). The second ground is overruled.

[3] Interrelated is the complaint expressed in the third ground that the jury should have been charged that any subsequent misrepresentations to third parties would be immaterial. To the contrary, the subsequent misrepresentations were material to the establishment of appellant's initial intent to appropriate Shaw's money by false pretext. See, e. g., Hoovel v. State, 125 Tex.Cr.R. 545, 69 S.W.2d 104 (1934), for the principle that in determining intent

1. Hearsay testimony has no probative value. Salas v. State, 403 S.W.2d 440 (Tex.Cr.App. 1966).

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Texas Cases 509-510 S.W.2d—15

at the time of the representation, the circumstances prior to, at the time of, and subsequent to the transaction must be considered. But in any event, the court's charge properly limited the jury's consideration of false pretext to appellant's representations to Shaw. The third ground is overruled.

[4] The ground first presented is that the court erred in excluding from evidence a verified statement previously executed by, and claimed by appellant to be contradictory of the trial testimony adduced from, the witness Shaw. The events leading to this contention are briefly recited.

Two days before the trial commenced on April 9, 1973, Shaw received a call from appellant's parents. They wanted to make restitution if Shaw would agree to "drop the charges." Shaw received fifty dollars. He executed a verified instrument entitled "Release and Statement of Refusal to Prosecute." The instrument recites that Shaw released appellant, subject to any claims his insurance company may have against appellant, from all claims arising from the occurrence, that Shaw had "knowledge of no facts upon which any criminal prosecution could be based," and that Shaw would appear as a witness only under compulsion.²

Prior to the introduction of evidence, the State presented its motion in limine seeking to exclude from the jury any affidavit or statement of non-prosecution executed by Shaw. After hearing argument of counsel, the court granted the motion.

At the close of the guilt-innocence phase of the trial, appellant tendered Shaw's statement for admission into evidence. Following argument of counsel, the court again refused to admit the statement.

The thrust of appellant's presentation is that the portion of Shaw's verified statement reading, "I have knowledge of no

2. No challenge was made to the prosecutor's in-court statement that Shaw was voluntarily appearing as a witness.

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facts upon which any criminal prosecution could be based" was admissible for impeachment purposes. We do not agree.

This is not the situation where, as in *Hutson v. State*, 164 Tex.Cr.R. 24, 296 S.W.2d 245 (1956), relied upon by appellant, the witness denied expressing a prior opinion opposed to that he testified to at the trial, in which event, *Hutson* holds, evidence of the prior statement may be received as proof that he did make such statement. At the trial in the instant case, Shaw expressed no opinion concerning appellant's guilt.

Neither is it the situation where, as shown in appellant's cited cases announcing the proposition that, an adverse witness may be impeached by his prior statement contradictory to his trial statement on a material issue. Here, Shaw's prior statement was not inconsistent with any material testimony he gave at the trial.

[5] Rather, here, Shaw's statement that he had no knowledge of appellant's guilt of a criminal offense presents the situation of a mere expression of opinion that appellant was not guilty. It long has been the rule in this State that a prior statement is not admissible if it is confined to an opinion that the accused is not guilty or to other

irrelevant matters. *Taylor v. State*, 33 Tex.Cr.R. 552, 43 S.W. 1019 (1898). Falling into that category, the statement was not admissible. The first ground is overruled.

[6] Finally, appellant contends the court erred in withdrawing the question of punishment from, and submitting only a charge as to the special pleas to the allegations of prior felony convictions to, the jury. The ground is without merit.

Upon tender of the charge on punishment to counsel, the court inquired if there were any objections. One of defense counsel answered, "So far, Your Honor, I have no objection" and, after a discussion of the forms of verdict, the same counsel stated, "I have no objection."

[7] The acquiescence in, and the absence of an objection to, the form of the charge not only failed to preserve but waived any error, *Jaffrion v. State*, 501 S.W.2d 322 (Tex.Cr.App.1973), and, therefore, nothing pertaining to the charge is presented for review. *Dominguez v. State*, 459 S.W.2d 628 (Tex.Cr.App.1970). The fourth and last ground is overruled.³

The judgment is affirmed.

Opinion approved by the Court.

3. It is noted in passing that appellant, to support the contention that the jury should have fixed the punishment, quotes subsection 2(b) of Article 37.07, Vernon's Ann.C.C.P., which was repealed in 1967. Subsection 1(b) of the statute now provides that, except in a situation not material here, the jury "shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty."

Pursuant to appellants plea of "True" before the jury to each of the two allegations of a prior non-capital felony conviction contained in the enhancement portion of the indictment and proof of the convictions, the court's charge required the jury to assess the punishment un-

less the jury returned a verdict of "True" to appellant's special pleas. The jury answered "True" and the court assessed punishment at life as required by Article 63, Vernon's Ann.P.C., which was then in force.

Appellant's two prior non-capital felony convictions being properly alleged and proved, the punishment was fixed by Art. 63, V.A.P.C., at life imprisonment. Once the jury returned its verdict of "True," the court properly assessed the punishment; there was no necessity for the jury to assess the punishment because it was automatically fixed by law. See *Williams v. State*, 463 S.W.2d 18 (Tex.Cr.App. 1971).

SENTENCE
 THE STATE OF TEXAS

NO. 73-CR-214

VS. WILLIAM J. RUMEL

OFFENSE: THEFT OVER FIFTY DOLLARS
 BY FALSE PRETEXT (HABITUAL)

On this the 26th day of APRIL A.D. 1973, this cause being

again called; the State appeared by the District Attorney and the defendant appeared in person and by counsel WILLIAM B. CHEAUAULT, III, HAROLD WARFORD, for the purpose of having sentence of the law pronounced

in accordance with the verdict and judgement rendered and entered against him on APRIL 20, 1973 NO MOTION FOR NEW TRIAL HAVING BEEN FILED ON THIS DATE APRIL 26, 1973 SIGNATURES OF COUNSEL

And thereupon the said defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said defendant to pronounce sentence against him as follows, to-wit: "It is the order of the Court that the defendant WILLIAM J. RUMEL, who has been adjudged to be guilty of THEFT OVER FIFTY DOLLARS BY FALSE PRETEXT (HABITUAL)

a felony, and whose punishment has been assessed at confinement in the Texas Department of Corrections for LIFE years, be delivered by the Sheriff of Bexar County, Texas immediately to the Director of Corrections of the State of Texas, or other person legally authorized to receive such convict, and said defendant shall be confined in said Department of Corrections for LIFE, in accordance with the provisions of the law governing the Texas Department of Corrections."

It is further ordered that said sentence do begin and operate from:

Whereupon the Court advised the defendant fully as to his right of appeal, and notice of appeal having been given, the said defendant is remanded to jail until said Sheriff can obey the directions of this sentence.

HEREUPON, IN OPEN COURT, BY AND THROUGH HIS COUNSEL, DEFENDANT GAVE NOTICE OF APPEAL TO OUR COURT OF CRIMINAL APPEALS AT AUSTIN, TEXAS AND THEREFORE, SAID DEFENDANT IS HEREBY GRANTED NINETY (90) DAYS IN WHICH TO PERFECT SAID APPEAL AND THE EXECUTION OF THE SENTENCE HEREIN IMPOSED IS STAYED PENDING RECEIPT OF THE MANDATE OF THE COURT OF CRIMINAL APPEALS AT AUSTIN, TEXAS AND DEFENDANT IS REMANDED TO JAIL.

VERDICT & JUDGMENT - PLEA OF NOT GUILTY BEFORE JURY WITH PUNISHMENT ASSESSED BY JURY
THE STATE OF TEXAS NO. 73-CR-214

vs. WILLIAM J. BURKE OFFENSE: THEFT OVER FIFTY DOLLARS
BY FALSE PRETEXT (HABITUAL)

On this 9th day of APRIL, A. D. 1973, the above entitled and numbered cause being called for trial, appeared the parties, the State of Texas by her district attorney, and defendant, WILLIAM J. RUMMEL . in person and by counsel, WILLIAM CHEAUAULT, III and both parties having announced ready for trial; said defendant having heretofore been duly arraigned and entered a plea of Not Guilty.

Thereupon a jury composed of KENNETH R. CLARK and eleven others was selected, impanelled and sworn, and after hearing the indictment read, the defendant's plea of not guilty thereto and the evidence submitted, and having been charged by the Court as to their duty to determine the guilt or innocence of the defendant, and heard the arguments of counsel thereon, they retired in charge of the proper officer and returned into open court, in due form of law, on the 10th day of APRIL A. D. 1973, the following verdict which was received by the Court and is now entered upon the minutes:

WE, THE JURY, FIND THE DEFENDANT WILLIAM J. RUMBLE GUILTY OF THE OFFENSE OF THEFT OF CORPOREAL PERSONAL PROPERTY OVER THE VALUE OF \$50.00 AS ALLEGED IN

/s/ KENNETH R. CLARK

Thereupon, the defendant requested that the same jury assess the punishment, and in accordance with law, after further evidence was heard and after having been again charged by the Court, the jury retired in charge of the proper officer and returned into open court,

in due form of law, on the 10th day of APRIL, A. D. 19 73, the following verdict which was received by the Court and is now entered upon the minutes: We the Jury having found the defendant, William J. Rummel guilty of the offense of theft. Over Fifty Dollars by False Pretext as alleged in the 1st paragraph of the indictment, further find that cause #60-9778 and the same paragraph was true and finally convicted in cause #60-9778 of the offense of cause #60-9778 was true; before convicted on the 16th day of December A. D. 1968 in cause #60-9778 of the offense of Presentation Of Credit Card With Intent To Defraud Credit Service of the Value of Fifty Dollars (\$50.00) or more, as alleged in the 3rd paragraph of the indictment and find that the allegations in the 2nd and 3rd paragraphs of the indictment are "TRUE".

/s/ KENNETH R. CLARK

It is therefore CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant is guilty of the offense of THEFT OVER FIFTY DOLLARS BY FALSE PRETEXT (MATERIAL)
and that he be punished, as has been determined by the Jury, at confinement in the Texas
Department of Corrections for a term of "LIFE" years.

It is further ORDERED by the Court, that the State of Texas do have and recover from said defendant all costs of prosecution for which execution may issue, and the defendant be (remanded to jail) (continued remand) to await the further order of this court.

APPENDIX

The Eighth Amendment to the United States Constitution provides as follows:

Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishments inflicted.

Article 12.42(d) of the Texas Penal Code of 1974 provides as follows:

If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having been final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life.

Article 63 of the Texas Penal Code of 1925 provides as follows:

Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.

Article 979 of the Texas Penal Code of 1925 provides,
in pertinent part:

He is guilty of forgery who without lawful authority, and with intent to injure or defraud, shall make a false instrument in writing purporting to be the act of another, in such manner that the false instrument so made would (if the same were true) have created, increased, diminished, discharged or defeated any pecuniary obligation, or would have transferred, or in any manner have affected any property whatsoever.

Article 996 of the Texas Penal Code of 1925 provides,

in pertinent part:

If any person shall knowingly pass as true, or attempt to pass as true, any such forged instrument in writing as is mentioned and defined in the preceding articles of this chapter, he shall be confined in the penitentiary not less than two nor more than five years.

Article 1410 of the Texas Penal Code of 1925 provides as follows:

"Theft" is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking.

Article 1413 of the Texas Penal Code of 1925 provides, in pertinent part:

The taking must be wrongful, . . . but if the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete.

Article 1555b of the Texas Penal Code of 1925 provides, in pertinent part:

Section 1. It shall be unlawful for any person to present a credit card or alleged credit card, with the intent to defraud, to obtain or attempt to obtain any item of value or service of any type; or to present such credit card or alleged credit card, with the intent to defraud, to pay for items of value or services rendered.

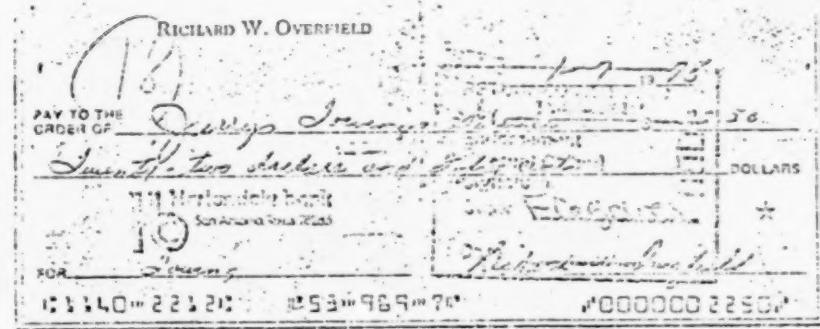
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FEBRUARY 21 1978
FBI - SAN ANTONIO

TRUE BILL OF INDICTMENT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS, the Grand Jury of Bexar County, State of Texas, duly organized, empaneled and sworn as such at the MARCH term, A. D., 1978, of the 175TH Judicial District Court of said County, in said Court, at said term, do present in and to said Court that in the County and State aforesaid, and anterior to the presentment of this indictment, and on or about the

7th day of JANUARY, A.D., 1978, LICHEL ALBERT GUTIERREZ hereinafter called defendant did then and there knowingly and intentionally with intent to defraud and harm another, PASS TO JOHNNIE SANCHEZ a CHECK, WHICHEVER, A CHECK that had been MADE, EXECUTED AND COMPLETED so that it purported to be the act of another who did not authorize the act, and the said defendant knew said CHECK was forged and which said CHECK is to the tenor following:

LETTERS AND NUMERALS 'RETURNED NOT PAID by 1140-2212 ENDORSEMENT ACCOUNT CLOSED SIGNATURE OTHER forgeries DATE ' THE ENCIRCLED '18' 'NOT' AND THE ILLEGIBLE MARKS, ACROSS THE FACE OF SAID INSTRUMENT AND '0000002250' AT THE LOWER RIGHT HAND CORNER OF SAID INSTRUMENT WERE ADDED AFTER IT WAS PASSED TO JOHNNIE SANCHEZ.



THE GRAND JURORS aforesaid do further present that prior to the commission of each of the aforesaid offenses by the defendant, to-wit: on the 21st day of JANUARY, A.D., 1964, in the 150TH District Court of LIMAR COUNTY, TEXAS, in Cause No. E-3617-S, on the docket of said Court, the said LIONEL ALBERT GUERRERO, the aforesaid defendant, was duly and legally convicted in said last named court of a felony, to-wit: CHILD ABSENCE - SECOND OFFENSE, upon an indictment then legally pending in said last named Court and of which said Court had jurisdiction; and said conviction was a final conviction and was a conviction for an offense committed by the defendant, prior to the commission of the offense hereinbefore charged against him, as set forth in the FIRST paragraph hereof.

And the Grand Jurors aforesaid do further present that prior to the commission of each of the aforesaid offenses by the defendant, to-wit: on the 21st day of JANUARY, A.D., 1964, in the 150TH District Court of LIMAR COUNTY, TEXAS, in Cause No. E-3617-S, on the docket of said Court, the said LIONEL ALBERT GUERRERO, the aforesaid defendant, was duly and legally convicted in said last named court of a felony, to-wit: CHILD ABSENCE - SECOND OFFENSE, upon an indictment then legally pending in said last named Court and of which said Court had jurisdiction; and said conviction was a final conviction and was a conviction for an offense committed by the defendant prior to the commission and conviction of the offense hereinbefore charged against him in the SECOND paragraph hereof, and said conviction set forth in this paragraph was prior to the commission of the offense set forth in the FIRST paragraph hereof; against the peace and dignity of the State.

Foreman of the Grand Jury

THE FOLLOWING FOR DISTRICT CLERK'S USE ONLY

OFFENSE: FORGERY
NAME: LIONEL ALBERT GUERRERO
ADDRESS: 611 W. SALINAS
GRAND JURY NO. 129656

FILE NO. 53-CR-6538 HABITUAL 1867
WITNESS: STATE'S ATTORNEY

cb

THE ORIGINAL OF THIS
PAGE FILED WITH THE COURT
WAS ALMOST TOTALLY ILLEGIBLE.

MAR 22 1970

Jesse Vandy

STATE OF TEXAS
COUNTY OF BEXAR

I, TOM RICHHOFER, DISTRICT CLERK OF BEXAR COUNTY,
do hereby certify that the foregoing is a
true and correct copy of the original record, now
in my lawful custody and possession, as appears
on record filed.....

3-22-78 in my office.

Witness my official hand and seal of office, this

1-14-79

TOM RICHHOFER, DISTRICT CLERK
Bexar County, Texas
By *Cecilia Hernandez*

MINUTES, 14TH JUDICIAL DISTRICT COURT, BEXAR COUNTY, TEXAS
AT NOVEMBER TERM, A.D. 1978 VOL.: _____
PAGE: _____

VERDICT AND JUDGMENT=PLEA OF NOT GUILTY BEFORE JURY WITH PUNISHMENT ASSESSED
BY JURY=HABITUAL FFLONY OFFENDER

THE STATE OF TEXAS NO.: 78-CR-538 IN THE DISTRICT COURT,
14TH JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

VS. OFFENSE: FORGERY
LIONEL ALBERT GUERRERO (HABITUAL FFLONY OFFENDER)

On this 1st day of NOVEMBER, the above styled and numbered cause being called for trial, appeared the parties, The State of Texas by her District Attorney, and defendant, LIONEL ALBERT GUERRERO, in person and by counsel, CRAIG SPENCE, and both parties announced ready for trial, said defendant having heretofore been duly arraigned and entered a plea of Not Guilty.

Thereupon a jury composed of WILLIE ALLEN JAMES and eleven others was selected, impanelled and sworn, and after hearing the first paragraph of the indictment read, the defendant's plea of not guilty thereto and the evidence submitted, and having been charged by the Court as to their duty to determine the guilt or innocence of the defendant, and heard the arguments of counsel thereon, they retired in charge of the proper officer and returned into open court, in due form of law, on the 1st day of NOVEMBER, the following verdict which was received by the Court and is now entered upon the Minutes: "We, the Jury, find the defendant, Lionel Albert Guerrero, guilty of the offense of forgery."

/s/ WILLIE ALLEN JAMES
FOREMAN

Thereupon, the defendant having timely requested that the same jury assess the punishment, and in accordance with law, The State of Texas read the second and third paragraphs of the indictment, to which the defendant LIONEL ALBERT GUERRERO, pleaded "Not True", and after further evidence was heard, having been again charged by the Court and heard the arguments of counsel thereon the jury retired in charge of the proper officer and returned into open court, in due form of law, on the 2nd day of NOVEMBER the following verdict which was received by the Court and is now entered upon the Minutes:

"We, the Jury, having found the defendant, Lionel Albert Guerrero, guilty of the offense of forgery, as charged in the first paragraph of the indictment, do further find that he is one and the same person who was duly, legally and finally convicted in Cause Number SA70CAL23 of the offense of having, with intent to defraud the United States, uttered and published as true,

Vol. 21CR Page 771

MINUTES, 14TH JUDICIAL DISTRICT COURT, BEXAR COUNTY, TEXAS VOL: _____
AT NOVEMBER TERM, A.D. 1978 PAGE: _____

SENTENCE

THE STATE OF TEXAS

NO. 78-CR-538

VS.

LIONEL ALBERT GUERRERO

OFFENSE: FORGERY (HABITUAL)

On the 6TH day of DECEMBER A.D. 1978, this cause being again called; the State appeared by the District Attorney and the defendant appeared in person and by counsel JOE STENBERG, for the purpose of having sentence of the law pronounced in accordance with the verdict and judgement rendered and entered against him on NOV. 1, 1978; Defendant's amended motion for a new trial having been filed on November 17, 1978, and having been denied and overruled on this date herein;

And thereupon the said defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said defendant to pronounce sentence against him as follows, to-wit: "It is the order of the Court that the defendant: LIONEL ALBERT GUERRERO, who has been adjudged to be guilty of FORGERY (HABITUAL) a felony, and whose punishment has been assessed at confinement in the Texas Department of Corrections for "LIFE" years, be delivered by the Sheriff of Bexar County, Texas immediately to the Director of Corrections of the State of Texas, or other person legally authorized to receive such convict, and said defendant shall be confined in said Department of Corrections for not less than "LIFE" years nor more than "LIFE" years, in accordance with the provisions of the law governing the Texas Department of Corrections."

It is further ordered that said sentence do begin and operate from: JANUARY 14, 1978 and thereupon, said defendant, in open court by and through his counsel, gave Notice of Appeal to the Court of Criminal Appeals at Austin, Texas; wherefore execution of the sentence imposed herein is hereby ORDERED stayed pending receipt of the Mandate of our Court of Criminal Appeals at Austin, Texas, said defendant is hereby granted ninety days from this date in which to perfect said appeal and the said defendant is remanded to jail until said Sheriff can obey the directions of this sentence.

SIGNED and ENTERED, THIS 13th DAY OF December, 1978.

Vol. 21CR Pages 373

Peter Michael Curry

PETER MICHAEL CURRY JUDGE PRESIDING
FOR THE 14TH DISTRICT COURT

63a

1/16/78 Motion for New Trial was denied
on December 6, 1978. 64a

On Appeal Court, 78-CP-0538

THE STATE OF TEXAS *Dodge*

VS.

LIONEL ALBERT GUERRERO

FILED

NOV 17 1978

IN THE DISTRICT COURT

166th JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

AMENDED
MOTION FOR NEW TRIAL

Harry W. Eugene

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, LIONEL ALBERT GUERRERO, the Defendant in the above numbered and entitled cause, and moves the Court to set aside the verdict and judgment herein rendered against him on November 2nd, 1978, and grant him a new trial because of the following reasons, to-wit:

I

That the habitual criminal statute, specifically, Section 12.42 of the Texas Penal Code, which requires the trial court to sentence a defendant to life imprisonment upon a third conviction for any felony, is, as applied to the defendant, violative of the Eighth Amendment to the United States Constitution.

II

That the second count of the indictment alleges that in 1970, the Defendant was convicted of a felony, to-wit: HAVING, WITH INTENT TO DEFRAUD THE UNITED STATES, UTTERED AND PUBLISHED AS TRUE, UNITED STATES TREASURY CHECK NUMBER 18,758,046, DATED SEPTEMBER 1969, IN THE AMOUNT OF \$123.10, BEARING THE PURPORTED ENDORSEMENT OF THE PAYEE, WHICH ENDORSEMENT WAS FORGED, AS THE DEFENDANT THEN AND THERE WELL KNEW. Further, the third count alleges that in 1964, the Defendant was convicted of a felony, to-wit: CHILD DESERTION - SECOND OFFENSE.

III

That the case of Rummel v Estelle, rendered by the 5th Circuit Court of Appeals on March 6, 1978, holds that "In addition to limiting the kinds of punishment that a state may impose and placing substantive limits on what a state may declare criminal and punish as such, the Cruel and Unusual Punishment Clause prescribes amounts of punishment which are grossly disproportionate to the severity of the crime."

IV

That the Defendant would point out to this Honorable Court that the third count of the indictment alleging child desertion-second offense would under present Texas Law constitute a felony of the third degree with the punishment for any term of not more than 10 years or less than 2 years in the Department of Corrections.

STATE OF TEXAS
COUNTY OF BEXAR
I, TOM RICKHOFF, DISTRICT CLERK OF BEXAR COUNTY,
Texas, do hereby certify that the foregoing is a
true and correct copy of the original record, now
in my lawful custody and possession, as appears
in record _____
in my office.
Witness my official hand and seal office, this

1-16-79
TOM RICKHOFF, DISTRICT CLERK
Bexar County, Texas

Alvin Alexander

Further, that the second count alleges the offense of having, with intent to defraud the United States, uttered and published as true, United States treasury check number 18,758,046, dated Sept., 1969, in the amount of \$123.10, bearing the purported endorsement of the payee, which endorsement was forged, as the defendant then and there well knew which under present Texas Law constitutes a third degree felony with a punishment range from 2 to ten years.

VI

Apart from its habitual criminal statute, Texas imposes a mandatory life sentence (or death) only for the crime of capital murder: murdering a policeman, fireman, or prison employee, murdering for pay or while escaping from prison, or while committing kidnapping, burglary, robbery, aggravated rape or arson. A trial court could impose a sentence for as little as five years if the defendant had committed a single first degree felony, such as murder, aggravated rape, or arson. The same five year minimum would apply if the defendant had committed a second degree felony with a prior conviction for another: for example, aggravated kidnapping with a prior conviction for rape or voluntary manslaughter with a prior conviction for burglary. With a single conviction for a third degree felony, the trial court could impose a term no longer than 10 years and as short as 2 years.

VII

Compared with the above statutory punishment for violent felonies, for which Texas does not bind the trial court's hand in granting leniency, the punishment of life indiscriminately imposed upon the defendant is too harsh.

VIII

As in Rummel, the intervening action by the Texas legislature, underscores the relatively trivial nature of the defendant's first offense, because Texas law treats such an offense as a misdemeanor. (See page 2587).

IX

Further, the Defendant's second offense constitutes a third degree felony under Texas law, and under state law the maximum proscribed such conduct would be 5 years.

X

The Defendant would further point out to the court that the Defendant's first offense occurred some 15 years ago and that intervening action by the legislature underscores the relative insignificance of that offense which would be punished by a maximum of one year in the county jail.

XI

The Defendant would therefore, submit to the court that in view of the dramatically lower minimum penalties that Texas imposes upon defendants who commit even the most violent crimes short of capital murder and even upon defendants with a second conviction and a prior offense involving violent second degree felonies, a significantly less penalty would fulfill the legislative objectives of protecting citizens and deterring crime.

XII

That the legislative prerogative to fix sentences is not unbounded under Rummel, (See page 2588) and that in this case the application of nondiscretionary judicial action would be a violation of the Eighth Amendment.

XIII

Defendant further contends that the court committed material error calculated to injure the rights of the defendant by allowing the state to introduce evidence of extraneous nature such as the evidence that was used to indict defendant on three previous indictments and said indictment were pending and untried said evidence being the alleged forged checks which are alleged to have been passed by defendant. Where the state did not offer any clear and conclusive evidence that it was this defendant who attempted the previous forgeries which were allowed to go before the jury. Where the physical elements of the charged offense were not matched by the physical elements of the conduct alleged to comprise extrinsic the offenses that were offered to show defendants intent to pass the check to "Johnnie Sanchez".

XIV

Further the court misdirected the jury as to the law constituting a material error which is reasonably calculated to injure, and did injure, the rights of the defendant. The Charge of the Court is fundamentally defective in the following particulars:

(1) The Charge allowed the jury to find the defendant "guilty" if the jury found, inter alia, that the defendant had intent to utter a check to "another," while the indictment alleged that the defendant had intent to pass said check to "Johnnie Sanchez" (emphasis added), thereby permitting the jury to find the defendant "guilty" even if the defendant lacked the intent to pass the check to Johnnie Sanchez;

(2) The Court's Charge allowed the jury to find the defendant "guilty" of the offense of forgery if the jury found that the defendant knew that the check was altered, made, completed, executed or authenticated, while the indictment alleged only that the defendant knew the check had been "MADE, EXECUTED, AND COMPLETED," thereby allowing the jury to convict the defendant if they found

that he knew that the check was altered or authenticated, grounds for conviction not alleged in the indictment;

(3) The Court's Charge, in Paragraph _____ where the law was applied to the facts of the particular case, did not require the jury to find that the check alleged in the indictment was actually forged before finding the defendant "guilty" of the offense of forgery; The Court's Charge did not, therefore, apply the law to the facts insofar as it failed to instruct the jury that it must find the instrument possessed by the defendant was actually forged before finding the defendant "guilty";

(4) The Court's Charge was fundamentally defective in that, although the indictment alleged the check was forged, the Charge allowed the jury to convict the defendant for forgery without requiring that the jury first find that the check involved was actually forged, as alleged in the indictment, thus permitting the jury to convict the defendant on a ground not alleged in the indictment.

XV

in

The Court committed material error calculated to jure the rights of the defendant by allowing defendant to be prosecuted on defective indictment on the grounds that the Grand Jury alleged that the check had been "MADE, EXECUTED AND COMPLETED so that it purported to be the act of another who did not authorize that act" without specifying the identity of that other person who did not authorize the act.

XVI

The verdict of the jury is contrary to law and evidence in the following particulars:

- (1) There is no evidence that the check alleged in the indictment was forged;
- (2) There is not evidence that the check received into evidence was forged;
- (3) There is insufficient evidence that the check alleged in the indictment was forged;
- (4) There is insufficient evidence that the check admitted into evidence at trial was forged;
- (5) There is no evidence that the defendant knew the check admitted into evidence at trial was forged, if it was;
- (6) There is insufficient evidence to sustain the finding that the defendant knew the check admitted into evidence was forged, if it was;
- (7) There is no evidence to support the finding of the jury that the defendant had intent to defraud and harm another;
- (8) There is insufficient evidence to support the finding of the jury that the defendant intended to defraud and harm another.

WHEREFOR, PREMISES CONSIDERED, the Defendant respectfully moves this Court to grant to him a new trial in this cause.

Respectfully Submitted,

LIONEL ALBERT GUERRERO-Defend.
218 So. Laredo St.
San Antonio, Texas 78207

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion For New Trial was served upon the State's attorney, Mr. _____, by hand delivering to same on the _____ day of _____, 1978.

LIONEL ALBERT GUERRERO
Defendant Pro-Se

NO.: 78-CR-528 THE STATE OF TEXAS VS. LIONEL ALBERT GUERRERO

United States Treasury check number 18,758,016 dated September 1969, in the amount of \$123.10, bearing the purported endorsement of the payee, which endorsement was forged, as the defendant then and there well knew, as alleged in the second paragraph of the indictment and further find that he is one and the same person who was duly, legally and finally convicted in Cause Number D-3617-S of the offense of Child Desertion - Second Offense as alleged in the third paragraph of the indictment and find that all the allegations in the second and third paragraphs of the indictment are "True."

It is therefore CONSIDERED, ORDERED and ADJUDGED by the Court that the defendant, LIONEL ALBERT GUERRERO, is guilty of the felony offense of FORGERY.

that said defendant committed said offense on JANUARY 7, 1978, and that he be punished, as has been determined by the Jury, at confinement in the Texas Department of Corrections for a term of LIFE.

It is further ORDERED by the Court that the State of Texas do have and recover from said defendant all costs of prosecution for which execution may issue, and the defendant be remanded to jail to await the further order of this Court. DEFENDANT GIVEN TEN (10) DAYS MOTION FOR A NEW TRIAL.

Vol. 301L-Sub-A 166

Peter Michael Curry
PETER MICHAEL CURRY JUDGE PRESIDING
FOR THE 144TH DISTRICT COURT

STATE OF TEXAS
COUNTY OF BEXAR
I, JOHN WICKHAM, DISTRICT CLERK OF BEXAR COUNTY,
do hereby certify that the foregoing is a true copy of the original record now
in my office, and is a true copy of the original record now
in my office.
11-19-78 In my office.
Witness an official handwriting in my office this

1-16-79
JOHN WICKHAM, DISTRICT CLERK
Bexar County, Texas

John Wickham

STATE OF TEXAS
COUNTY OF BEXAR

I, TOM RICKHOFF, DISTRICT CLERK OF BEXAR COUNTY,
Texas, do hereby certify that the foregoing is a
true and correct copy of the criminal record, now

in my lawful custody and possession, as appears

of record ~~_____~~ in my office.

Witness my official hand and seal of office, this

1-16-79

TOM RICKHOFF, DISTRICT CLERK

Bexar County, Texas

Aurora Hernandez

Supreme Court, U.S.
FILED

JUL 16 1979

MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6386

WILLIAM JAMES RUMMEL,

Petitioner,

v.

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 18, 1979
CERTIORARI GRANTED MAY 21, 1979

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Motion of Surety to Surrender Defendant, Dated Jan. 30, 1973	2
Defendant's Letter Notice of Appeal to the 187th District Court of Bexar County, Texas, Filed April 16, 1973 ..	3
Order Denying Petition for Habeas Corpus Relief of the District Court of the United States for the Western District of Texas, San Antonio Division, Filed May 14, 1976	4
Judgment of the District Court of the United States for the Western District of Texas, San Antonio Division, Filed May 17, 1976	7
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Order Granting Petitioner's Petition for Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis of the United States Supreme Court, Entered May 21, 1979	57

**CHRONOLOGICAL LIST
OF RELEVANT DOCKET ENTRIES**

Jan. 31, 1973—Indictment issued by the Grand Jury of Bexar County, Texas.

Apr. 9, 1973—Jury trial of action commenced in the 187th State District Court of Bexar County, Texas.

Apr. 10, 1973—Court's charge to the jury, and verdict of the jury in favor of the State.

Apr. 26, 1973—Judgment entered sentencing petitioner to life imprisonment.

May 22, 1974—Opinion filed of the Texas Court of Criminal Appeals affirming petitioner's conviction.

Mar. 4, 1975—Petitioner's application for writ of habeas corpus filed in the 187th State District Court of Bexar County, Texas.

July 25, 1975—Order entered denying petitioner's application for writ of habeas corpus.

Sept. 23, 1975—Action by the Texas Court of Criminal Appeals denying without written order petitioner's application for writ of habeas corpus.

Jan. 9, 1976—Petitioner's petition for writ of habeas corpus filed in the U.S. District Court for the Western District of Texas, San Antonio Division.

May 13, 1976—Order entered denying petitioner's petition for writ of habeas corpus.

May 17, 1976—Judgment entered denying petitioner's petition for writ of habeas corpus.

June 2, 1976—Petitioner's motion for reconsideration filed.

July 14, 1976—Order entered denying petitioner's motion for reconsideration, and petitioner's notice of appeal filed.

Mar. 6, 1978—Opinion and judgment filed by the U.S. Court of Appeals for the Fifth Circuit in favor of petitioner.

Apr. 21, 1978—Rehearing en banc granted by the Court of Appeals.

Dec. 20, 1978—Opinion filed and judgment entered by the Court of Appeals en banc in favor of the State.

Jan. 3, 1979—Petitioner's petition for rehearing filed.

Mar. 9, 1979—Order entered denying petitioner's petition for rehearing.

Mar. 19, 1979—Judgment issued in favor of the State.

OFF-BOND AFFIDAVIT
\$2500.00 Bond

Alias WARRANT OF ARREST

No. 53951

JUSTICE'S COURT PRECINCT NO. 1
Bexar County, Texas

THE STATE OF TEXAS

vs. FEB 6 1973

WILLIAM J. RUMMEL

In Bexar County Jail on other charges

Came to hand the 30 day of Jan 1973
and executed on the 30 day of Jan
1973 by

Ex-Officio Sheriff
Constable Precinct 1
Bexar County, Texas

W. B. "BILL" HAUCK, Sheriff
JOE FERRO, Constable, Precinct 1
Bexar County, Texas

By C. M. Hernandez, Deputy

FILING: PA. J. H. S.

MIKE HERNANDEZ, JR.
Sheriff of the Peace, Prec. No. 1
Bexar County, Texas

IN THE JUSTICE COURT PRECINCT NO. ONE
BEXAR COUNTY, TEXAS

MOTION OF SURETY TO SURRENDER DEFENDANT

No. 53951

THE STATE OF TEXAS

vs.

WILLIAM J. RUMMEL

Before me, the undersigned authority, on this day personally appeared James H. Hance, who, being by me duly sworn, deposes and says on his oath that he is one of the sureties on the appearance bond of said defendant, charged with the Felony Offense of Theft over \$50.00 which said cause is pending in this Court and numbered: 53951 on the Docket of this Court, and the said surety further states on his oath that he desires to surrender the said defendant into the custody of the Sheriff of Bexar County, Texas. Said surety further states on his oath that he has just cause to surrender said defendant, said cause being as follows: Defendant is in Bexar Co. Jail on other charges, Swindling by check, etc.

WHEREFORE, premises considered, petitioner prays that Court that an Alias Warrant issue addressed to the Sheriff of Bexar County, Texas, directing the said Sheriff to place the said defendant in Jail.

/s/ James H. Hance

Sworn and subscribed before me, this the 30th day of January, A.D. 1973

(seal)

/s/ Arturo Martinez
Notary Public in and for Bexar County, Texas

MOTION GRANTED AS PRAYED FOR AND AN ALIAS WARRANT ORDERED ISSUED.

/s/ Mike Hernandez, Jr.
Justice of the Peace, Precinct No. 1, Bexar County, Texas

DEFENDANT'S NOTICE OF APPEAL

HONORABLE JOHN BENAVIDES
187TH DISTRICT COURT
BEXAR COUNTY, TEXAS

SIR,

THIS IS MY OFFICIAL NOTICE OF APPEAL IN THE INSTANCE OF CAUSE # UNKNOWN, THEFT 0/50 UNDER FALSE PRETEXT, OF WHICH I WAS CONVICTED AND SENTENCED IN YOUR COURT THE 10TH DAY OF APRIL, 1973.

AND IN THE INSTANCE OF CAUSE # UNKNOWN SWINDLING BY WORTHLESS CHECK 0/50 OF WHICH I WAS CONVICTED AND SENTENCED IN YOUR COURT THE 10TH APRIL 1973.

William J. Rummel
WILLIAM J. RUMMEL
BEXAR COUNTY JAIL

FILING:
FILED
APR. 16, 1973
ELTON R. CUDE
Clerk of the District Courts
Bexar County, Texas
By: A. E. Ozuna,
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

WILLIAM JAMES RUMMEL

vs.

W. J. ESTELLE, JR., Director
Texas Department of Corrections

} SA-76-CA-20

**ORDER DENYING PETITION FOR HABEAS
CORPUS RELIEF—Filed May 14, 1976**

Petitioner, William James Rummel, was convicted in the 187th District Court of Bexar County, Texas, after his plea of not guilty upon the charges of theft of property over the value of \$50.00 by false pretext. Two prior convictions were proven in his record, and he was sentenced to life imprisonment. Upon appeal, Petitioner's conviction was affirmed by the Texas Court of Criminal Appeals. See *Rummel v. State*, 509 S.W.2d 630.

In the present Petition the Petitioner raises the following points of alleged error by the trial court:

- (1) Ineffective counsel, and
- (2) Harsh, cruel, and unusual punishment.

Neither of these points were raised upon appeal, but each was raised in a petition for habeas corpus in the trial court. In this connection, the trial judge filed findings of fact and conclusions of law, and found that the application was without merit and should be denied. Texas Court of Criminal Appeals followed this recommendation and denied the Petitioner's application without written order. Therefore, the Court finds that the Petitioner has exhausted his State court remedies pursuant to provisions of 28 U.S.C. § 2254(b).

After reviewing the record in the present case together with the transcript of State court proceedings, the Court finds that upon a showing of indigency the Petitioner was first appointed Mr. William B. Chenault, III, as counsel one month before his trial. Thereafter, on the day of trial, the Petitioner was appointed a second attorney at his own request, who was directed to assist his first appointed

counsel. The Petitioner complains that Mr. Chenault made no pretrial motions, no independent investigation of his case, did not know the names of the State's witnesses, and failed to call any witnesses on the Petitioner's behalf. Petitioner was released on bail some two weeks after his arrest and at least four months before Chenault was appointed to represent him. The Petitioner admitted knowing none of the names of the witnesses whom he contends that his attorney, Mr. Chenault, should have called to testify on his behalf, except for the complaining witness, Shaw. Chenault's co-counsel obtained an instrument from Mr. Shaw entitled "Release and Non-prosecution Statement." The instrument had first been the subject of a Motion in Limine by the State at the commencement of the trial, which Motion was granted and Chenault was instructed not to attempt to introduce it. Nevertheless, prior to the hearing on punishment at the conclusion of the trial, Chenault sought permission to offer it in evidence, but such permission was denied. As observed by the Appellate Court, Shaw's testimony was factual and expressed no opinion concerning the appellant's guilt, and the instrument was not admissible for impeachment purposes. Shaw's prior testimony given to the attorneys was not inconsistent with any material testimony he gave at the trial. As to the Petitioner's complaint that other "witnesses" were not called and that Mr. Chenault did not know their names, but knew where they worked, the Court finds that the Petitioner was at liberty on bail for many months before his attorneys ever had the opportunity to look into the matter of possible helpful evidence, and evidently made no effort to do so.

Although the trial judge held no evidentiary hearing, he prepared a remarkably detailed set of findings and conclusions which appear in the transcript. It shows that among other things, Mr. Chenault obtained a continuance on the Petitioner's behalf, discussed the case with Petitioner at the jail on at least three occasions, examined the State's file, communicated with the Petitioner's parents by telephone and letter, intensively cross-examined witnesses of the State, moved for an instructed verdict, objected to the Court's charge and submitted requested instructions, one of which was granted by the Court, and attempted to

impeach the complaining witness by introduction of the above mentioned instrument.

In the Petitioner's traverse, he cites the Fifth Circuit case of *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960), which is the landmark case within the Fifth Circuit on the standard for effective counsel. In *MacKenna*, the Fifth Circuit stated that the right to effective counsel means not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. *Id.* at 599. Reviewing the transcript of State court proceedings in this case in light of the Fifth Circuit's standard in *MacKenna*, the Court finds that Petitioner's first contention is without merit.

The second and final point raised by the Petitioner, namely, that he was subjected to cruel and unusual punishment in violation of the Constitution, by reason of the jury's verdict of life imprisonment based upon the enhancement statute, is also without merit. It has been held that the Texas enhancement statute is Constitutional. See *Spencer v. Texas*, 385 U.S. 551 (1967). The Fifth Circuit has also followed the *Spencer* decision. Further, the argument advanced by the Respondent to the effect that a "life sentence" is nothing of the sort because State Parole law in regulation entitles a convict to release on parole after he has served approximately twelve years, and even less if such prisoner is made a trusty, effectively answers any attack on this sentence as being cruel and unusual punishment forbidden by the Constitution. The Court finds Petitioner's second contention to also be without merit.

Therefore, for the reasons and authorities cited above, the Court finds that an evidentiary hearing is not warranted in this case, and that the Petitioner's application for habeas corpus relief should be and the same is hereby DENIED.

SO ORDERED this the 13th day of May, 1976.

/s/ D. W. Suttle
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

WILLIAM JAMES RUMMEL

vs.

W. J. ESTELLE, JR., Director,
Texas Department of Corrections

} SA-76-CA-20

JUDGMENT—Filed May 17, 1976

This action came on for consideration before the Court, Honorable D. W. Suttle, United States District Judge, and the issues having been duly considered and the Court having rendered a decision on May 14, 1976, denying Petitioner's application for habeas corpus relief,

It is, therefore, ORDERED AND ADJUDGED that the petition for writ of habeas corpus is denied and this cause is terminated.

DATED at San Antonio, Texas, this 17th day of May, 1976.

DAN W. BENEDICT, CLERK
UNITED STATES DISTRICT COURT

By: Carolyn L. Wright

Deputy U. S. District Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

WILLIAM JAMES RUMMEL,

vs.

W. J. ESTELLE, JR., Director
Texas Department of
Corrections

} SA-76-CA-20

ORDER DENYING PETITIONER'S MOTION FOR
RECONSIDERATION—Filed July 14, 1976

After reviewing the file in the present case, together with the Petitioner's Motion for Reconsideration filed June 2, 1976, the Court finds no new arguments or authorities not previously raised by the Petitioner and considered by the Court that would warrant the reconsideration and reversal of the Court's decision rendered May 14, 1976, denying the Petitioner's application for habeas corpus relief. The Petitioner's Motion for Reconsideration is, according, DENIED.

SO ORDERED this the 14th day of July, 1976.

/s/ D. W. Suttle
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

William James Rummel,
Petitioner-Appellant,

v.

W. J. Estelle, Jr., Director, Texas
Department of Corrections,
Respondent-Appellee.

No. 76-2946.

March 6, 1978.

Rehearing Granted April 21, 1978.

William James Rummel, pro se.

Scott J. Atlas, Houston, Tex. (court-appointed), for petitioner-appellant.

John L. Hill, Atty. Gen., Dunklin Sullivan, Asst. Atty. Gen., David M. Kendall, Jr., 1st Asst. Atty. Gen., Joe B. Dibrell, Gilbert J. Pena, Asst. Attys. Gen., Austin, Tex., for respondent-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before THORNBERRY, GOLDBERG, and CLARK,
Circuit Judges.

CLARK, Circuit Judge:

Petitioner William James Rummel appeals the district court's denial of habeas corpus relief from state confinement. He complains that the enhanced sentence he received constituted cruel and unusual punishment in violation of the eighth amendment and that his court-appointed attorney rendered ineffective assistance of counsel in violation of his sixth amendment rights. Because we hold that Rummel's life sentence is so grossly disproportionate to his crimes that it violates the Cruel and Unusual Punishments

Clause, we do not reach the question whether Rummel's trial counsel rendered adequate assistance.

In January 1973, a Texas grand jury indicted Rummel for the felony offense of obtaining \$120.75 under false pretenses. The indictment also charged him with having two prior felony convictions: In 1964 he presented a credit card with the intent to defraud of approximately \$80, and in 1969 he passed a forged instrument with a face value of \$28.36. Rummel pled not guilty to the false pretense indictment, but a jury found him guilty as charged. After the state proved his two prior convictions, Rummel received an enhanced sentence of life imprisonment under the Texas habitual criminal statute then applicable, Tex. Penal Code Ann. art. 63 (Vernon 1925).¹ On appeal, the Texas Court of Criminal Appeals affirmed his conviction. *Rummel v. State*, 509 S.W.2d 630 (Tex.Cr.App.1974). Rummel applied for post-conviction relief and raised in the Texas courts the issues now before us, but his application was denied without a hearing. Then Rummel sought habeas corpus relief in the federal district court, which also denied his petition without a hearing.

Article 63 requires the trial court to sentence a defendant to life imprisonment upon a third conviction for any felony, without consideration of any lesser penalty. On its face, this statute does not violate the eighth amendment. *Spencer v. Texas*, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967). Rummel does not maintain that Article 63 as written violates the eighth amendment, but that Texas could not apply its inflexible life imprisonment stricture of Article 63 to him because it abridged his protection against cruel and unusual punishment.²

In addition to limiting the kinds of punishment that a state may impose and placing substantive limits on what a state may declare criminal and punish as such, the Cruel and Unusual Punishments Clause proscribes amounts of

¹ Article 63 provides:

Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary. With slight rewording, the new Texas Penal Code preserves the provisions of Article 63, now codified as Tex. Penal Code Ann. § 12.42(d) (Vernon 1974).

² A state may apply a concededly valid statute in a particular case in such a way as to violate provisions of the Constitution. *Edwards v. South Carolina*, 372 U.S. 229, 53 S.Ct. 680, 9 L.Ed.2d 697 (1963); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

punishment which are grossly disproportionate to the severity of the crime. *Ingraham v. Wright*, 430 U.S. 651, 667, 97 S.Ct. 1401, 1410, 51 L.Ed.2d 711, 742 (1977). While the Supreme Court has yet to hold a sentence cruel and unusual for length alone, its reasoning never has suggested that a disproportionately long prison sentence would be immune from eighth amendment challenge.³ In *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1909), the Court held that a provision of the Philippine Code of Criminal Procedure allowing the imposition of a 15-year sentence to hard and painful labor in chains for a false entry on an official report violated the eighth amendment. The Court found the Code's minimum penalty of 12 years amazing in light of the American commonwealths' "precept of justice that punishment for crime should be graduated and proportioned to offense." 217 U.S. at 367, 30 S.Ct. at 549, 54 L.Ed. at 798. Subsequently, in *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1957), the Court overturned denationalization as a punishment for desertion from the military. An opinion by Chief Justice Warren, joined by three other members of the Court, put aside the death penalty as the index of the constitutional limit on punishment in these words:

[T]he existence of the death penalty [as punishment acceptable under the Constitution] is not a license to the Government to devise any punishment short of death within the limit of its imagination.

356 U.S. at 99, 78 S.Ct. at 597, 2 L.Ed.2d at 641. Justice Brennan, concurring, also judged the constitutionality of the punishment by its proportion to the crime:

[T]he severity of the penalty, in the case of a serious offense, is not enough to invalidate it where the nature of the penalty is rationally directed to achieve the legitimate ends of punishment.

356 U.S. at 111, 78 S.Ct. at 603, 2 L.Ed.2d at 648.

Recently, in *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), the Supreme Court amplified the proportionality component of the eighth amendment by holding that a punishment clearly permissible for some

³ But cf. *Ingraham v. Wright*, 430 U.S. 651, 670 n. 39, 97 S.Ct. 1401, 1412 n. 39, 51 L.Ed.2d 711, 730 n. 39 (1977).

crimes is constitutionally disproportionate for others. In *Coker*, the plurality opinion by Justice White, and Justice Powell's opinion concurring in the judgment of the Court, stressed disproportionality in holding that Georgia may not execute a defendant for rape. Both of these opinions emphasized that to the maximum possible extent, objective factors must inform the decision whether a particular punishment violates the eighth amendment. The Chief Justice's dissent challenged not the disproportionality approach, but the conclusion that death was in fact an excessive penalty for the crime of rape. Thus, *Coker* heralds a more exacting weighing of the relationship of the punishment to the crime, governed by objective factors.

Coker involved capital punishment, but that is not the only sentence which can be disproportionate. A sentence to imprisonment for life is surely not so lenient as to be unquestionably proportional under the eighth amendment wherever a state might impose it. Texas points out that a life sentence under its law amounts to less than a life sentence because a prisoner becomes eligible for parole after serving 20 years. With good conduct credit, eligibility accrues in 12 years; and with trusty status, in ten years. Texas argues that we should view its recidivist statute as a requirement that a defendant with two or more prior felonies prove himself within the prison system to achieve early release. Therefore, since a well-behaved prisoner could receive a term not grossly disproportionate for one committing a third offense, Texas argues that this court should not equate Rummel's sentence with one for actual incarceration for life.

The grant or denial of parole by a state, in the absence of some unusual circumstance, is not reviewable in federal court. If Rummel has a constitutional right not to be committed to prison for the remainder of his life to punish his offenses, then Texas may not deprive him of that right by suggesting it may be willing to interdict its denial by the future exercise of discretion which we have characterized as a matter of administrative grace.⁴ Indeed, if the propor-

⁴ *Brown v. Kearney*, 355 F.2d 199 (5th Cir. 1966). See also *Johnson v. Wells*, 566 F.2d 1016 (5th Cir. 1978).

It is no answer to suggest that the sentence imposed may never be carried out in fact, because the threat itself makes the punishment obnoxious. *Trop v. Dulles*, 356 U.S. at 102, 78 S.Ct. at 599, 2 L.Ed.2d at 643 (Opinion of Warren, C.J.). We distinguish the case at bar from cases in which we upheld prison

tionality of Rummel's sentence and hence its constitutionality depended upon the availability of parole, we would have to make a careful review of procedures and evidence in state parole proceedings, since the availability of parole in fact and the accuracy of individual parole decisions then would measure constitutional dimensions.

In most jurisdictions, a sentence to imprisonment for life now stands in the place where the death penalty stood earlier in this century—the ultimate punishment imposed by this society for those crimes most abhorrent to it. Therefore, the question of the proportionality of Rummel's life sentence to the crime of which he was convicted deserves a consideration which may be unnecessary for a lesser sentence.⁵

Rummel draws support for his eighth amendment claim from *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 983, 94 S.Ct. 1577, 39 L.Ed.2d 881 (1974). In *Hart* the Fourth Circuit held that a sentence imposed under a West Virginia recidivist statute was cruel and unusual based on length alone because it was grossly disproportionate to the crimes involved. The state court enhanced Hart's punishment for committing perjury at his son's murder trial to life imprisonment on the basis of a 1949 conviction for writing a \$50 check on insufficient funds and a 1955 conviction of interstate transportation of forged checks worth \$140. In determining that the West Virginia statute violated the eighth amendment as applied to Hart, the Fourth Circuit considered cumulatively (1) the nature of the offense, (2) the legislative purposes behind the punishment, (3) the punishment that the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction.

The analysis in *Hart* is not inconsistent with our prior applications of the Cruel and Unusual Punishments Clause. We have held that a punishment violates the eighth amendment only if it "is so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the

terms of lengths far in excess of a natural life span, e.g., *Yeager v. Estelle*, 489 F.2d 276 (5th Cir. 1973), cert. denied, 416 U.S. 908, 92 S.Ct. 1616, 40 L.Ed.2d 113 (1974). In those cases, natural law and not administrative grace invariably prohibited the state from carrying out any punishment greater than life imprisonment.

⁵ Cf. *Hall v. McKensie*, 537 F.2d 1232, 1235-36 (4th Cir. 1976); *Wood v. South Carolina*, 483 F.2d 149 (4th Cir. 1973).

sense of justice." *Rogers v. United States*, 304 F.2d 520, 521 (5th Cir. 1962). But we have never set forth in detail those factors which determine whether this standard has been met where the nature of the offense alone does not confirm the proportionality of the punishment. Some decisions of this circuit have cited *Hart* approvingly.⁶ However, because each of these cases involved at least one offense presenting a potential for violence, a strong social interest, or a sentence less severe than life, we upheld the sentence imposed without considering any part of the *Hart* analysis other than its initial inquiry into the nature of the crime.

The factors set forth in *Hart* have been central to the Supreme Court's major decisions applying the Cruel and Unusual Punishments Clause, although the Court has not applied them as systematically as did the Fourth Circuit. The nature of the crime figures prominently in *Coker v. Georgia*, 433 U.S. at 598-601, 97 S.Ct. at 2869-70, 53 L.Ed.2d at 993-994 (Opinion of White, J.); *id.* at 602, 97 S.Ct. at 2871, 53 L.Ed.2d at 996 (Opinion of Powell, J.); and *Weems v. United States*, 217 U.S. at 365-66, 30 S.Ct. at 548, 54 L.Ed. at 797-798. See also *Trop v. Dulles*, 356 U.S. at 92-93, 78 S.Ct. at 593-94, 2 L.Ed.2d at 637-638 (Opinion of Warren, C.J.). *Weems* took the object of the Philippine statute into account in determining that the sentence to painful labor in chains violated the eighth amendment. 217 U.S. at 363, 381, 30 S.Ct. at 547, 554-55, 54 L.Ed. at 804. In *Trop*, both the plurality opinion by Chief Justice Warren and Justice Brennan's concurrence considered the relation between the objectives of Congress and the penalty of denationalization. 356 U.S. at 96-98, 78 S.Ct. at 595-96, 2 L.Ed.2d at 639-641 (Opinion of Warren, C.J.); *id.* at 107-10, 78 S.Ct. at 601-03, 2 L.Ed.2d at 646-648 (Opinion of Brennan, J.). Recent cases also confirm the need to discern the legislative objective and to avoid displacing legislative discretion with judicial discretion. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 181-182, 96 S.Ct. 2909, 2929, 49 L.Ed.2d 859, 879-880 (1976) (Opinion of Stewart, J.), citing *Furman v. Georgia*, 408 U.S. 238, 451, 92 S.Ct. 2726, 2834, 33 L.Ed.2d 346, 472 (1972) (Powell, J., dissenting). Comparisons of challenged

⁶ *Capuchino v. Estelle*, 506 F.2d 440 (5th Cir. 1975), cert. denied, 423 U.S. 842, 96 S.Ct. 75, 46 L.Ed.2d 62 (1975); *Yeager v. Estelle*, 489 F.2d 276 (5th Cir. 1973), cert. denied, 416 U.S. 908, 92 S.Ct. 1616, 40 L.Ed.2d 113 (1974). *Browne v. Estelle*, 544 F.2d 1244 (5th Cir. 1977), cited *Hart* approvingly but dismissed because the issue was not properly presented as a class action.

punishments with punishments meted out in the same jurisdiction or other jurisdiction have also guided the Supreme Court in its major eighth amendment cases.⁷ Because *Hart* applies objective criteria solidly grounded in decisions of the Supreme Court, we hold that its form of analysis properly guides our decision.

In considering the constitutionality of Rummel's sentence, we look first to the nature of the crimes for which he was convicted. Our prior cases found this factor alone determinative where one or more offenses forming the basis for the sentence involved violence, a potential for violence, or a strong social interest. In *Yeager v. Estelle*, 489 F.2d 276 (5th Cir. 1973), cert. denied, 416 U.S. 908, 92 S.Ct. 1616, 40 L.Ed.2d 113 (1974), citing *Hart v. Coiner*, 483 F.2d 136, 139-40 (4th Cir. 1973), we upheld petitioner's 500-year prison term without proceeding to other points of the *Hart* analysis where the petitioner had been convicted of murder with malice. *Capuchino v. Estelle*, 506 F.2d 440 (5th Cir. 1975), cert. denied, 423 U.S. 842, 96 S.Ct. 75, 46 L.Ed.2d 62 (1975), upheld a life sentence under the Texas recidivist statute where the state meted out a life sentence to a defendant convicted of one crime involving violence (assault with intent to murder), one involving a potential for violence (burglary), and one implicating a particularly strong social interest (possession of narcotics paraphernalia). Similarly, in *King v. United States*, 565 F.2d 356 (1978), we examined only the nature of the offense in upholding a 15-year sentence for conspiracy to import heroin imposed consecutively with a 10-year sentence previously imposed for the substantive offense.⁸

⁷ See, e.g. *Coker v. Georgia*, 433 U.S. at 592-595, 97 S.Ct. at 2866-67, 53 L.Ed.2d at 990-991 (Opinion of White, J.); *id.* at 602, 97 S.Ct. at 2871, 53 L.Ed.2d at 996 (Opinion of Powell, J.) (comparing various states as to modifications to death penalty statutes after *Furman*); *Gregg v. Georgia*, 428 U.S. at 179, 96 S.Ct. at 2928, 49 L.Ed.2d at 878 (Opinion of Stewart, J.); *Weems v. United States*, 217 U.S. at 367-77, 380, 30 S.Ct. at 549-53, 554, 54 L.Ed. at 798-803, 804 (comparing challenged statute with state punishments, penalties available under federal law, and other penalties for more serious crimes in the same jurisdiction). See also *Trop v. Dulles*, 356 U.S. at 102-03, 78 S.Ct. at 599, 2 L.Ed. at 643 (Opinion of Warren, C.J.) (examining denationalization penalties imposed by other nations).

⁸ The Circuit which decided *Hart* has taken a similarly restrictive view of the sorts of crimes for which a life sentence can give rise to more than a frivolous claim of constitutional disproportionality. *Griffin v. Warden*, 517 F.2d 756,

None of Rummel's offenses present exacerbating factors justifying a severe penalty. Considered in combination, Rummel's offenses, although felonies under Texas law, lack those indicia of depravity generally associated with felonies and the heinousness of the offenses for which life imprisonment is a common punishment. They were substantially separated in time. None involved violence or the potential of violence. Each was solely a property crime and the amounts taken were not substantial.

Second, we consider the legislative objective in making the conduct a punishable offense. Here the inquiry seeks to determine whether a *significantly* less severe punishment could achieve the purposes for which the challenged punishment is inflicted. *Hart, supra*, 483 F.2d at 141. The Supreme Court has recognized the tension between an inquiry into legislative purpose and the need for federal courts to avoid substituting their discretionary judgment for that of the states. *Gregg v. Georgia*, 428 U.S. at 181-182, 96 S.Ct. at 2929, 49 L.Ed.2d at 879-880 (Opinion of Stewart, J.). In *Weems*, however, the Court showed less deference to the legislative judgment where "the law in controversy seems to be independent of degrees." 217 U.S. at 365, 30 S.Ct. at 548, 54 L.Ed. at 797. This latter condition is present in the case at bar. Article 63 indiscriminately punishes such a broad range of offenses with a mandatory life sentence that we can discern no clear legislative judgment that Texas

757 (4th Cir. 1975), upheld a life sentence for a defendant convicted of grand larceny, burglary, and breaking and entering because these offenses "clearly involve the potentiality of violence and danger to life as well as property." *Hall v. McKenzie*, 537 F.2d 1232 (4th Cir. 1976), upheld a 10 to 20-year sentence imposed upon a defendant in his early twenties convicted of the nonforcible rape of a thirteen year old female in part because the offense was a crime against the person.

Courts applying *Hart* have overturned few sentences. *Davis v. Zahradnick*, 432 F.Supp. 444 (W.D.Va. 1977), struck down two twenty-year consecutive sentences for one count of possession of marijuana with intent to distribute and one count of distribution where less than nine ounces was involved. The Sixth Circuit followed *Hart* in striking down 30- to 60-year sentences imposed upon first offenders for the same two offenses under Ohio law. *Downey v. Perini*, 518 F.2d 1288 (6th Cir. 1975), vacated on other grounds, 423 U.S. 993, 96 S.Ct. 419, 46 L.Ed.2d 367 (1975). *Roberts v. Collins*, 544 F.2d 168 (4th Cir. 1976), cited *Hart* in holding that the eighth amendment prohibits a state from imposing a greater sentence for a lesser included offense than it could impose for the comprehensive crime. See also *United States v. Neary*, 552 F.2d 1184, 1195 (7th Cir. 1977).

could achieve its penological objectives only by imposing a life sentence on one such as Rummel.

The Texas recidivist statute aims at protecting citizens from incorrigible repeat offenders. While Rummel's offenses merit punishment, not only individually but also because of their cumulative impact, they hardly suggest that he presents such a threat to society as to call forth its harshest penalty short of death. Whether a particular punishment is grossly disproportionate to a rational penological objective is best answered by the last points of the *Hart* analysis, which compare the punishment imposed with available penalties for other offenses and with penalties in other jurisdictions.

A comparison of Rummel's sentence with the punishment accorded other crimes under Texas law further highlights the irrational severity of the life sentence mandated by Article 63. Because the trial court sentenced Rummel under a repeated offender statute, we consider Rummel's offenses together to determine whether the mandatory life sentence imposed upon him by the statute is proportionate to the combined offenses as compared with similar punishments inflicted under Texas law. *Hart v. Coiner*, 483 F.2d at 142. Apart from its habitual criminal statute, Texas imposes a mandatory life sentence (or death) only for the crime of capital murder: murdering a policeman, fireman, or prison employee, murdering for pay or while escaping from prison, or while committing kidnapping, burglary, robbery, aggravated rape, or arson.⁹ The trial court could have imposed a sentence for as little as five years if Rummel had committed a single first-degree felony, such as murder, aggravated rape, or arson.¹⁰ The same five-year minimum would have applied if Rummel had committed a second-degree felony with a prior conviction for another: for example, aggravated kidnapping with a prior conviction for rape or voluntary manslaughter with a prior conviction for burglary. With a single conviction for a second-degree

⁹ Tex. Penal Code Ann. § 19.03 (Vernon 1974) defines capital murder. *Id.* § 12.31 sets the punishment at life imprisonment or death.

¹⁰ Tex. Penal Code Ann. § 12.32 (Vernon 1974) punishes first-degree felonies with a prison sentence of 5 to 99 years. Murder, *id.* § 19.02, aggravated rape, *id.* § 21.03, and arson, *id.* § 28.02, are among the crimes treated as first-degree felonies.

felony, the trial court could impose a term no longer than 20 years and as short as two years.¹¹

Compared with those statutory punishments for violent felonies for which Texas does not bind the trial court's hand in granting leniency, the punishment indiscriminately imposed on Rummel is too harsh. In combination, Rummel's deceitful acts deprived his victims of approximately \$230. The record suggests that no harmful consequences beyond the loss of the money itself flowed from his offenses. Intervening action by the Texas legislature underscores the relatively trivial nature of Rummel's third offense, because Texas law now treats a first offense of theft by false pretext only as a misdemeanor.¹²

Comparing Rummel's sentence with the sentence imposed in other jurisdictions for similar offenses, confirms the gross disproportionality between his crime and his sentence.¹³ At the time Rummel was convicted several states had statutes allowing the sentencing court to impose a life sentence upon a third felony conviction for crimes such as his. However, only Indiana and Washington made the life sentence mandatory upon the third conviction for any felony. Indiana has since modified its statute¹⁴ and a

¹¹ Aggravated kidnapping, Tex. Penal Code Ann. § 20.04 (Vernon 1974), rape, *id.* § 21.03, voluntary manslaughter, *id.* § 19.04, and burglary, *id.* § 30.02(a)-(c) are second-degree felonies, punishable under *id.* § 12.33 for a prison term of from 2 to 20 years. Under *id.* § 12.42(b), a defendant convicted of his second felony in the second degree is punished as a first-degree felon, thereby requiring a 5-year minimum sentence under *id.* § 12.32.

¹² Under the new Texas Penal Code, theft of \$120 by false pretext constitutes a Class A misdemeanor. Tex. Penal Code Ann. § 31.03(b)(1) & (d)(3) (Vernon 1974 & 1977 Supp.). A Class A misdemeanor carries a maximum jail term of one year, *id.* § 12.21. This legislative change suggests that Rummel's offense ranked low in the hierarchy of felonies under Texas law, although standing alone it has little persuasive value. *Capuchino v. Estelle*, 506 F.2d at 442.

¹³ This is not a search for a norm or a demand for conformity in these diverse jurisdictions. Some states might validly impose an uncustomarily harsh sentence for an offense not regarded so seriously in others where it has a larger interest in controlling that deviation. It also may impose a stiffer penalty where an offense, non-serious in itself, forms part of a pattern of conduct which is a particular problem for that state. Crimes involving dangerous drugs may fall in this category. None of Rummel's offenses presents such an interest.

¹⁴ Under Indiana's new statute, the sentencing court adds a 30-year additional term to the maximum sentence imposed upon a third-time felon. Ind. Code Ann. § 35-50-2-8 (Burns 1977 Supp.). West Virginia's recidivist statute remains on the books, but *Hart* limits its application. W.Va. Code § 61-11-18. Although most states impose higher penalties upon third-time felons than upon first-offenders, no other states have determined that all third-time felony offenders

decision by the Supreme Court of Washington makes it questionable whether a mandatory life sentence could have been imposed upon one in Rummel's situation.¹⁵ Thus, the state of Texas now stands virtually alone in its unqualified demand for life imprisonment for a three-time felon even where his convictions were for minor property crimes involving neither violence nor a remote possibility of violence.

Our assessment of Rummel's sentence in light of the *Hart* factors leads us to conclude that imposing a life sentence for these three crimes is so grossly disproportionate to the offenses as to constitute cruel and unusual punishment in violation of the eighth amendment. Rummel's offenses involved no special factor sufficient to call forth so severe a sentence. The legislative objective of punishing recidivists certainly is legitimate. However, in view of the dramatically lower minimum penalties that Texas imposes upon defendants who commit even the most violent crimes short of capital murder and even upon defendants with a second conviction and a prior offense involving violent second-degree felonies, it clearly appears that a significantly less severe penalty would fulfill the legislative objectives of protecting citizens and deterring crime. The recent reclassification of Rummel's third offense as a misdemeanor under Texas law buttresses this view. That at most two other states and perhaps none would require life imprisonment for a defendant in Rummel's circumstances confirms the constitutional disproportionality of the sentence given Rummel.

must receive a sentence of life in prison. State statutes for the most part employ one or more of the following techniques in determining the additional penalty: (1) punishment is keyed to the grade of the third offense by increasing the minimum punishment or by making the punishment the mandatory maximum, a multiple of the maximum or the maximum plus a fixed term of years; (2) a lengthy sentence is allowed, but its imposition in a particular case is left to the discretion of the sentencing court; (3) a relatively small mandatory minimum is applied to all third-time felons, with greater mandatory punishments available for fourth offenses; (4) severe penalties are required but only for listed violent felonies.

In addition to Indiana, Washington, and West Virginia, the following state statutes appear to require the strictest mandatory punishment for one in Rummel's situation: N.C. Gen. Stat. §§ 14-7.1, -7.6 (20-year minimum); Okla. Stat. Ann. tit. 21, § 51 (West) (20 years plus maximum for third offense). Several states provide for a ten-year minimum for a third offense and a few provide for a mandatory life sentence for a fourth felony conviction.

¹⁵ In *State v. Lee*, 87 Wash.2d 932, 558 P.2d 236, 240 n. 4 (1977), the Supreme Court of Washington agreed that the sentence in *Hart* was disproportionate, although it found Lee's sentence within constitutional bounds.

Rummel maintains that a finding that the Texas habitual criminal statute violates the eighth amendment requires his immediate release. He points out that because a jury sentenced him, Texas law requires a trial de novo in which he may elect to be tried under the new Texas Penal Code, which classifies his third offense as a misdemeanor. Even if he were to receive the maximum sentence as a repeat misdemeanant, he would have served his sentence already. We do not pass upon this theory, but leave the question for the courts of Texas to decide.

We add an important caveat to our holding that the Texas habitual criminal statute, as applied to Rummel in this instance, violates the eighth amendment. Today's precedent signals no beginning for appellate review of judicial sentencing discretion. We expressly recognize both that the prerogative to fix sentence ranges for proscribed criminal conduct belongs to the legislative and not the judicial branch and that it is extremely broad. We hold only that it is not unbounded. We overturn this nondiscretionary judicial action in applying an inflexible legislative edict because it can be objectively demonstrated to be grossly disproportionate to any rational penological objective to be served in this particular case.

The decision of the district court is reversed with directions to grant a writ of habeas corpus for the release of Rummel, unless within 60 days the state of Texas shall resentence him to punishment according to Texas law but not inconsistent with this opinion.

REVERSED and REMANDED with directions.

THORNBERRY, Circuit Judge, dissenting:

With deference, I must dissent.

Perhaps, if I were the prosecutor, I would not have sought an indictment charging the defendant with an habitual count; if I were a state lawmaker I would vote to amend the statute so that it would not be applied as has been done here; or if I were governor of the State of Texas, I would consider the petitioner a prime candidate for clemency. But I do not hold these offices and my decision must be guided by the eighth amendment rather than my feelings of compassion and justice. In that amendment, I find nothing that compels the result reached by the majority.

The majority accepts Rummel's argument that a life

sentence is so grossly disproportionate to the crimes he committed that it cannot withstand an eighth amendment attack. To reach that result the majority focuses on the small amount of money involved and the asserted triviality of all of Rummel's offenses. But Rummel was not sentenced to life imprisonment for stealing \$230.00; the life sentence resulted from his having committed three separate and distinct felonies under the laws of Texas. If the state is entitled to characterize a particular criminal act as a felony,¹ and to enforce its constitutional habitual criminal statute,² I cannot understand how these two constitutional statutes coalesce to produce an unconstitutional result. No neutral principle of adjudication³ permits a federal court to hold

¹ The state's right to categorize an offense as a felony and to determine appropriate punishment in the first instance is beyond dispute. That this is so is demonstrated by the variety of statutory schemes relating to the type of offenses for which Rummel received habitual criminal treatment. Not only do some statutes retain the technical common law distinctions, compare Fla. Rev. Stat. Ann. § 812.021 (grand larceny statute) with Ga. Code Ann. 26-1803, et seq. (theft statutes), but the dollar amounts necessary to comprise a felony offense vary considerably. See Alabama Code Ann., Tit. 14, § 331 (Cum. Supp. 1973) (felony to take personal property worth more than \$25.00); Fla. Rev. Stat. Ann. § 812.021 (felony to take property worth more than \$100 or of an aggregate value of \$200 in a twelve month period); Miss. Code Ann. § 97-17-41 (felony to take property worth more than \$100). Thus I assume that Texas' right to impose a monetary boundary on felony offenses could not have been challenged by the petitioner. That Texas has since raised that limit is irrelevant. Prior law in this circuit so dictates. In *Capuchino v. Estelle*, 506 F.2d 440 (5 Cir. 1975), the petitioner was convicted of possession of narcotics paraphernalia. Two prior non-capital felonies were used for enhancement and he received a life sentence under the very statute the present petitioner challenges. In upholding the denial of habeas corpus, the panel specifically rejected the rationale of *Hart v. Coiner*, 483 F.2d 136 (4 Cir. 1973), cert. denied, 415 U.S. 983, 94 S.Ct. 1577, 39 L.Ed.2d 881 (1974), despite the fact that at the time of his habeas Capuchino could not have been convicted of more than a misdemeanor for which he could have served a year in jail.

² *Spencer v. Texas*, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967). The majority concedes that the Texas statute is not unconstitutional but adopts an "unconstitutional-as-applied" approach to determine that in this instance the statute is invalid. The cases cited by the majority to support its approach are, however, inapposite to the issue in this case.

³ The majority embraces the disproportionality rationale of *Hart v. Coiner*, *supra*, because it "applies objective criteria" to eighth amendment determinations. With due respect to my colleagues, I find no such objectivity in today's decision. The first of the four criteria requires a court inquiry into the "nature of the crime." The characterization of Rummel's crimes as minor property offenses is a subjective one based on the majority's decision that there simply was not enough money involved to permit the state to exact a life imprisonment. For many \$200.00 is not an insignificant sum of money. To state that a crime is

that in a given situation individual crimes are too trivial in relation to the punishment imposed. I know of no stopping point for today's decision.

While it is well-settled that the eighth amendment circumscribes legislative power to punish crime,⁴ the balance to be struck when a court enters this traditionally legislative field is not easily determined. The judicial function lies somewhere between abdication of fundamental responsibility in the guise of judicial restraint and the insertion of judicial conceptions of wisdom and propriety. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 2741, 33 L.Ed.2d 346 (1972) (Brennan, J. concurring). To my mind, the majority has strayed too far in the latter direction.

In doing so, the majority depreciates the state's interest in protecting its citizens from the repetition of property crimes. Having found that Rummel was not "depraved," "heinous," or "incorrigible," the majority facilely submits that he does not pose such a threat to society to merit life imprisonment. In spite of an attempt to limit this case through an "unconstitutional-as-applied approach," the result of its conclusion will surely be an attack on the habitual offender statute in every instance of its attempted application to property crime. However, nothing in the court's

one against property does not dispose of the difficulty involved in these cases. That difficulty is apparent in later Fourth Circuit decisions. Two years after *Hart* was written, its own author refused to apply it in *Griffin v. Warden, West Virginia State Penitentiary*, 517 F.2d 756 (4th Cir.), cert. denied, 423 U.S. 990, 96 S.Ct. 402, 46 L.Ed.2d 308 (1975). Griffin was charged with grand larceny. His two prior offenses were breaking and entering and burglary of a residence. The court stated:

These and grand larceny are serious offenses that clearly involved the potentiality of violence and danger to life as well as property. Whether or not Griffin may be actually deserving of such extreme punishment is not within our province to decide; . . .

See also Wood v. State of South Carolina, 483 F.2d 149 (4 Cir. 1973) (refusing to apply *Hart* to a five-year sentence for an obscene telephone call; defendant had prior convictions for larceny and auto theft).

The second prong of the *Hart* test, whether the penalty was necessary to accomplish the legislative purpose, is subject to the same criticism as the first. The last element, comparison of punishment of other offenses is limited by *Capuchino, supra*. This leaves only the third element that Texas' penalty is harsh in comparison with other states to support the majority opinion.

⁴ See *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977); *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910).

opinion informs state prosecutors, courts, or legislatures of the possible limits of error.

Moreover, today's decision signals a departure from longstanding precedent in this circuit. In *Rogers v. United States*, 304 F.2d 520 (5 Cir. 1962), the defendant was convicted of possession of a letter stolen from an authorized mail depository, forgery of a treasury check and the uttering of forgery with intent to defraud the United States. The treasury check underlying the offenses was for \$380.51. None of Rogers' prior convictions involved violence. The panel affirmed his twenty-five-year sentence as within the statutory limit and found it unnecessary to pass on whether the sentence was within the eighth amendment standards.⁵ In *Rener v. Beto*, 447 F.2d 20 (5 Cir. 1971), cert. denied, 405 U.S. 1051, 92 S.Ct. 1521, 31 L.Ed.2d 787 (1972), the court upheld a thirty-year sentence for the possession of a single marijuana cigarette with the following statement:

This Circuit has long followed the principle that a sentence within the statutory limits set by a legislature is not to be considered cruel or unusual. (citations omitted). A sentence of thirty years is within the range of punishment prescribed by the Texas Penal Code for a second offense of possession of marijuana.

If the majority's analysis is correct, Rummel's case is indeed the "easy" one in which to apply it. Here the court faces an individual charged with what may seem to many to be insignificant offenses when the spotlight is on the amount of money involved. Surely the principle of decision cannot be the dollar sign, and the court gives no other indication where the line is to be drawn. Whatever sociological analysis I might apply to this case, I cannot avoid the conclusion that with this decision we stand on the brink of the "slippery slope" in its most classic sense. For that reason I cannot add my voice to that of the majority and must respectfully—but firmly—DISSENT.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MOR-

⁵ See also *Yeager v. Estelle*, 489 F.2d 276 (5 Cir.), cert. denied, 416 U.S. 908, 94 S.Ct. 1616, 40 L.Ed.2d 113 (1973). (Citing *Hart*, but refusing to overturn a "patently absurd" 500-year sentence for murder with malice.)

GAN, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY,
RUBIN and VANCE, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

William James RUMMEL,
Petitioner-Appellant,

v.

W. J. ESTELLE, Jr., Director, Texas
Department of Corrections,
Respondent-Appellee.

No. 76-2946.

Dec. 20, 1978.

William James Rummel, pro se.

Scott J. Atlas (Court-appointed), Houston, Tex., for petitioner-appellant.

John L. Hill, Atty. Gen., Dunklin Sullivan, Asst. Atty. Gen., David M. Kendall, Jr., First Asst. Atty. Gen., Joe B. Dibrell, Gilbert J. Pena, Douglas M. Becker, Asst. Attys. Gen., Austin, Tex., for respondent-appellee.

Keith W. Burris, Asst. Crim. Dist. Atty., San Antonio, Tex., for Crim. Dist. Atty. of Bexar County, Tex., amicus curiae.

Michael Kuhn, Asst. Dist. Atty., Houston, Tex., for Dist. Atty. of Harris County, Tex., amicus curiae.

Harry J. Schulz, Jr., Asst. Dist. Atty., Dallas County, Tex., for Henry Wade, Crim. Dist. Atty., Dallas County, Tex., amicus curiae.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges.

THORNBERRY, Circuit Judge:

This is a habeas corpus case in which the petitioner, William Rummel, challenges his life sentence under the

Texas habitual criminal statute¹ as cruel and unusual punishment in violation of the eighth amendment. A panel of this court held that his sentence violated the eighth amendment because his sentence was grossly disproportionate to his crimes. *Rummel v. Estelle*, 568 F.2d 1193 (5 Cir. 1978). The court has reheard this important case en banc and vacates the panel opinion.

I.

Facts

As stated by the panel opinion, the relevant facts are:

In January 1973, a Texas grand jury indicted Rummel for the felony offense of obtaining \$120.75 under false pretenses. The indictment also charged him with having two prior felony convictions: In 1964 he presented a credit card with the intent to defraud of approximately \$80, and in 1969 he passed a forged instrument with a face value of \$28.36. Rummel pled not guilty to the false pretense indictment, but a jury found him guilty as charged. After the state proved his two prior convictions, Rummel received an enhanced sentence of life imprisonment under the Texas habitual criminal statute then applicable, Tex. Penal Code Ann. art. 63 (Vernon 1925).¹ On appeal, the Texas Court of Criminal Appeals affirmed his conviction. *Rummel v. State*, 509 S.W.2d 630 (Tex.Cr.App.1974). Rummel applied for postconviction relief and raised in the Texas courts the issues now before us, but his application was denied without a hearing. Then Rummel sought habeas corpus relief in the federal district court, which also denied his petition without a hearing.

568 F.2d at 1195.

¹ Rummel was convicted under Tex. Penal Code Ann. art. 63 (Vernon 1925). This article provides:

Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary. With slight rewording, this provision is carried into the new Texas Penal Code. The provision is now found at Tex. Penal Code Ann. § 12.42(d) (Vernon 1974). The statute in various forms has been the law in Texas since 1856. See Tex. Laws 1856, Paschal, *Digest of Texas Laws*, art. 2464 (1866).

II.

As a preliminary matter, the State suggests that Rummel's petition is barred by *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), and the Texas "Contemporaneous Objection Rule" because Rummel failed to object to the mandatory life sentence at the punishment stage of his trial. In *Sykes*, the Court recognized the legitimate state interest inherent in a contemporaneous objection rule. See *St. John v. Estelle*, 563 F.2d 168 (5 Cir. 1977) (en banc). Since it is apparent that the Texas Court of Criminal Appeals has repeatedly rejected Rummel-like challenges to the Texas habitual criminal statute,² we are at a loss to see how any state interest would be served by demanding that Rummel make a futile gesture at his trial. Moreover, Texas apparently does not require a contemporaneous objection when a defendant challenges the constitutionality of the statute under which he was convicted. *Gann v. Keith*, 151 Tex. 626, 253 S.W.2d 413, 417 (1952).

III.

The Panel Opinion

The panel majority held that Rummel's life sentence under the Texas recidivist statute must be considered one for the entire term of Rummel's life, irrespective of any consideration of statutory good time. The majority reasoned that to consider good time credits would require the court to become involved in the parole process. 568 F.2d at 1196. Next, the court adopted the proportionality standards set out in *Sart v. Coiner*, 483 F.2d 136 (4 Cir. 1973), cert. denied, 415 U.S. 983, 94 S.Ct. 1577, 39 L.Ed.2d 881 (1974). *Id.* Finally, the panel held that under these standards Rummel's life sentence violated the eighth amendment. *Id.* at 1200.

IV.

The initial question we must answer is: Does the eighth amendment prohibit some prison sentences for minor of-

² *Shaver v. State*, 496 S.W.2d 604 (Tex.Cr.App. 1974); *Rogers v. State*, 486 S.W.2d 786 (Tex.Cr.App. 1972); *Flores v. State*, 472 S.W.2d 146 (Tex.Cr. App. 1971); *Vandall v. State*, 438 S.W.2d 578 (Tex.Cr.App. 1969); *Ex Parte Reyes*, 383 S.W.2d 804 (Tex.Cr.App. 1964); *Mackie v. State*, 367 S.W.2d 697 (Tex.Cr.App. 1963); *Young v. State*, 170 Tex.Cr.R. 498, 341 S.W.2d 911 (1960); *Bedding v. State*, 159 Tex.Cr.R. 535, 265 S.W.2d 811 (1954).

fenses solely because of their length? The State argues that this court is without power under the eighth amendment to review any prison sentence within the legislatively created maximum. And, to be sure, there is language in some of our opinions³ and elsewhere⁴ that supports this argument.

On the other hand, Rummel argues that an excessively long prison sentence for a trivial crime can be cruel and unusual punishment. Rummel, too, is aided by language in our opinions⁵ and elsewhere.⁶

³ *Salazar v. Estelle*, 547 F.2d 1226, 1227 (5 Cir. 1977) (semble); *Rener v. Beto*, 447 F.2d 20, 23 (5 Cir. 1971), cert. denied, 405 U.S. 1051, 92 S.Ct. 1521, 31 L.Ed.2d 787 (1972); *Castle v. United States*, 399 F.2d 642, 652 (5 Cir. 1968); *Ginsberg v. United States*, 96 F.2d 433, 437 (5 Cir. 1938).

⁴ *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 565, 54 L.Ed. 793 (1910) (cases cited in dissenting opinion); *Downey v. Perini*, 518 F.2d 1288, 1292 (6 Cir. 1975) (dissenting opinion), vacated on other grounds, 423 U.S. 993, 96 S.Ct. 419, 46 L.Ed.2d 367 (1975); *United States v. Pruitt*, 341 F.2d 700, 703 (4 Cir. 1964); *Anthony v. United States*, 331 F.2d 687, 693-94 (9 Cir. 1964); *Smith v. United States*, 273 F.2d 462, 467-68 (10 Cir. 1959), cert. denied, 363 U.S. 846, 80 S.Ct. 1619, 4 L.Ed.2d 1729 (1960); *Edwards v. United States*, 206 F.2d 855, 857 (10 Cir. 1953); *United States v. Rosenberg*, 195 F.2d 583, 604 (2 Cir.), cert. denied, 344 U.S. 838, 73 S.Ct. 20, 97 L.Ed. 652 (1952); *United States v. Sorcay*, 151 F.2d 899, 902 (7 Cir. 1945), cert. denied, 327 U.S. 794, 66 S.Ct. 821, 90 L.Ed. 1021 (1946); *Gurera v. United States*, 40 F.2d 338, 340 (8 Cir. 1930); *Parker v. Bounds*, 329 F.Supp. 1400, 1402 (E.D.N.C. 1971); *Ormento v. United States*, 328 F.Supp. 246, 257 (S.D.N.Y. 1971); Cases cited in footnote 2, *supra*.

⁵ *United States v. Bondurant*, 555 F.2d 1328, 1329 (5 Cir.), cert. denied, 434 U.S. 871, 98 S.Ct. 215, 54 L.Ed.2d 150 (1977); *United States v. Gamboa*, 543 F.2d 545, 548 (5 Cir. 1976); *United States v. Thevis*, 526 F.2d 989, 991 (5 Cir. 1976); *Bonner v. Henderson*, 517 F.2d 135, 136 (5 Cir. 1975); *Capuchino v. Estelle*, 506 F.2d 440, 442 (5 Cir. 1975); *United States v. Harbolt*, 455 F.2d 970 (5 Cir. 1972); *Yeager v. Estelle*, 489 F.2d 276 (5 Cir. 1973), cert. denied, 416 U.S. 908, 94 S.Ct. 1616, 40 L.Ed.2d 113 (1974); *United States v. Drotar*, 416 F.2d 914, 916 (5 Cir. 1969); *Rodriguez v. United States*, 394 F.2d 825 (5 Cir. 1968); *Rogers v. United States*, 304 F.2d 520, 521 (5 Cir. 1962).

⁶ *Moore v. Cowan*, 560 F.2d 1298, 1302 (6 Cir. 1977); *Roberts v. Collins*, 544 F.2d 168 (4 Cir. 1976); *Hall v. McKenzie*, 537 F.2d 1232, 1235 (4 Cir. 1976); *Downey v. Perini*, 518 F.2d 1288 (6 Cir. 1975), vacated on other grounds, 423 U.S. 993, 96 S.Ct. 419, 46 L.Ed.2d 367 (1975); *Hart v. Coiner*, 483 F.2d 136 (4 Cir. 1973), cert. denied, 415 U.S. 983, 94 S.Ct. 1577, 39 L.Ed.2d 881 (1974); *Ralph v. Warden*, 438 F.2d 786 (4 Cir. 1970), cert. denied, 408 U.S. 942, 92 S.Ct. 2846, 33 L.Ed.2d 766 (1972); *Black v. United States*, 269 F.2d 38, 43 (9 Cir. 1959); *Hemans v. United States*, 163 F.2d 228, 237 (6 Cir.), cert. denied, 332 U.S. 801, 68 S.Ct. 100, 92 L.Ed. 380 (1947); *State v. Farrow*, 386 A.2d 808 (N.H. 1978); *State v. Freeman*, 223 Kan. 362, 574 P.2d 18, 27 (Mo. 1978) (en banc); *State v. Remmers*, 259 N.W.2d 779, 782 (Iowa 1977); *Stockton v. Leeks*, 237 S.E. 896, 897-98 (S.C. 1977); *State v. Calendine*, 233 S.E.2d 318, 330 (W.Va. 1977); *State v. Lee*, 87 Wash.2d 932, 558 P.2d 236, 240 n.4 (1976)

As has been frequently noted, the Supreme Court has never held a punishment unconstitutional because of length alone.⁷ We do know, however, that each of the nine Supreme Court Justices, at least in death cases, has embraced the proportionality concept. *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1976) (White, Stewart, Blackmun, Stevens, JJ., plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (Stewart, Powell, Stevens, JJ., plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 272 n.14, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring); *id.* at 458, 92 S.Ct. at 2838 (Burger, Powell, Blackmun, Rehnquist, JJ., dissenting opinion).

Were this a question of history alone, we must admit that we would have great difficulty in accepting the proportionality analysis, despite the efforts to demonstrate to the contrary. See Granucci, "Nor Cruel and Unusual Punishment Inflicted: The Original Meaning," 57 Calif.L.Rev. 839 (1969), Comment, "The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine," 24 Buffalo L.Rev. 783 (1975). We conclude, however, that as a result of jurisprudential development the eighth amendment's cruel and unusual punishment provision also prohibits unreasonable punishment, and a component of unreasonable punishment can be an excessive sentence for a trivial offense. As early as *Rogers v. United States*, 304 F.2d 520, 521 (5 Cir. 1962), the court recognized that a punishment could be cruel and unusual if "it is so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice."

(en banc), appeal dismissed, 432 U.S. 901, 97 S.Ct. 2943, 53 L.Ed.2d 1074 (1977); *People v. Broadie*, 37 N.Y.2d 100, 371 N.Y.S.2d 471, 332 N.E.2d 338 (1975), cert. denied, 423 U.S. 950, 96 S.Ct. 372, 46 L.Ed.2d 287 (1975); *In re Lynch*, 8 Cal.3d 410, 105 Cal.Rptr. 217, 503 P.2d 921 (1973); *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972); *Calhoun v. State*, 85 Tex. Cr.R. 496, 214 S.W. 335, 338 (1919) (semble); *McDonald v. Commonwealth*, 173 Mass. 322, 53 N.E. 874, 875 (1899); *State ex rel. Garvey v. Whitaker*, 48 La. Ann. 527, 19 So. 457 (1896) (semble); *State v. Driver*, 78 N.C. 423 (1878) (semble).

⁷ Rummel's reliance on *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), must be substantially discounted by the holding in *Badders v. United States*, 240 U.S. 391, 36 S.Ct. 367, 60 L.Ed. 706 (1916). In *Badders*, the Court, per Holmes, J., summarily dismissed a proportionality attack on a five year sentence for mail fraud.

We do not wish to retreat from this rule and therefore we conclude that the eighth amendment does proscribe some punishments that are so disproportionate as to have no rational support. As the Second Circuit has recently said in *Carmona v. Ward*, 576 F.2d 405, 409 (2 Cir. 1978), cert. denied, — U.S. —, 99 S.Ct. —, 58 L.Ed.2d — (1979) "[W]e accept the proposition that in some extraordinary instance a severe sentence imposed for a minor offense could, solely because of its length, be a cruel and unusual punishment."

V.

Since we have concluded that some criminal sentences can be so disproportionate as to amount to cruel and unusual punishment, the question then becomes one of the proper standard to apply.

First, we hold that a punishment must be viewed as it occurs in the real world. We will consider the system as it actually works and we will not pass on academic possibilities. Second, we will at all times be mindful that it is the legislature that selects the range of punishments and it is our duty to uphold the legislature if there is any rational basis for so doing. We will remember that the petitioner challenging his sentence carries a heavy burden, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 2926, 49 L.Ed.2d 859 (1976), and the petitioner does not discharge this burden merely by showing that he is treated more harshly than he would be treated in another state or by positing a more rational system than the one adopted by the legislature. Finally, we must remember that we can uphold a punishment as judges and disagree with that punishment as men.

Our ultimate disagreement with the panel opinion is not that it applied the *Hart v. Coiner*⁸ standards, three of which

⁸ Recently, the Fourth Circuit has apparently seen the difficulty in applying *Hart v. Coiner* to its fullest extent. In *Davis v. Davis*, 585 F.2d 1226 (1978), reversing *Davis v. Zahradnick*, 432 F.Supp. 444 (W.D. Va. 1977), the Fourth Circuit refused to overturn a forty year sentence for possessing and distributing approximately nine ounces of marijuana. The Fourth Circuit stated that the *Hart* inquiry was limited to cases in which a life sentence is imposed. *Id.* Interestingly, the Fourth Circuit relied on *Yeager v. Estelle*, 489 F.2d 276 (5 Cir. 1973), cert. denied, 416 U.S. 908, 94 S.Ct. 1616, 40 L.Ed.2d 113 (1974). In *Yeager*, we upheld a 500 year sentence for murder with malice. Considering Texas law, we are unable to distinguish between *Yeager*'s 500 year sentence and Rummel's life sentence. Therefore, we will not follow the Fourth Circuit's lead and limit our inquiry to life cases. In Texas, a life sentence has essentially the same effect as one for sixty years. Certainly, the inquiry must be the same in both cases.

we adopt today, but from its failure to uphold a sentence if there is any rational basis for so doing.

VI.

A. *The Texas Habitual Criminal Law*

Recidivist statutes have been upheld many times against a variety of challenges.⁹ The starting point of our analysis is that Article 63 is constitutional. In *Spencer v. Texas*, 385 U.S. 554, 87 S.Ct. 648, 651, 17 L.Ed.2d 606 (1967), the Court said:

. . . No claim is made here that recidivist statutes are themselves unconstitutional, nor could there be under our cases. Such statutes and other enhanced-sentence laws . . . have been enacted in all the States, and by the Federal Government as well. . . . Such statutes, though not in the precise procedural circumstances here involved, have been sustained in this Court on several occasions against contentions that they violate constitutional strictures dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities. [Citations omitted.]

Article 63 provides:

Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.

Texas strictly construes this provision. Before one can be sentenced under the enhanced penalty provision, the State must prove that each succeeding conviction was subsequent to both the commission of and conviction for the preceding offense. *Tyra v. State*, 534 S.W.2d 695, 698 (Tex. Cr.App. 1976). Moreover, the defendant must actually have gone to prison before the State can use the previous conviction for enhancement, *Cromeans v. State*, 160 Tex.Cr.R.

⁹ *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1961); *Gryger v. Burke*, 334 U.S. 728, 732, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948); *Graham v. West Virginia*, 224 U.S. 616, 623 (1912); *McDonald v. Massachusetts*, 180 U.S. 311, 312, 21 S.Ct. 389, 45 L.Ed. 542 (1901); *Moore v. Missouri*, 159 U.S. 673, 677, 16 S.Ct. 179, 40 L.Ed. 301 (1895); *Wilson v. Slayton*, 470 F.2d 986 (4 Cir. 1972); *Wessling v. Bennett*, 410 F.2d 205 (7 Cir. 1969); *Price v. Allgood*, 369 F.2d 376 (5 Cir. 1966), cert. denied, 386 U.S. 998, 87 S.Ct. 1321, 18 L.Ed.2d 349 (1967); see generally, Katkin, Habitual Offender Laws: A Reconsideration, 21 Buffalo L.Rev. 99 (1971).

135, 268 S.W.2d 133, 135 (1954), and no conviction can be used for enhancement more than one time when establishing the habitual criminal status, *Carvajal v. State*, 529 S.W.2d 517, 521 (Tex.Cr.App.1975), cert. denied, 424 U.S. 926, 96 S.Ct. 1139, 47 L.Ed.2d 336 (1976); *Ex Parte Montgomery*, 571 S.W.2d 182, 183 (Tex.Cr.App.1978).

In practice the following events must happen before Article 63 is ever called into question:

(1) A defendant must be convicted of a felony¹⁰ and must be sent to prison.

(2) After the defendant has been convicted of the first felony, he must be convicted of a second felony. Again, the defendant must be given a prison term.

(3) After the defendant has been convicted of the second felony and sent to prison for the second time, the defendant must be convicted of a third felony.

Most American jurisdictions do not interpret their recidivist statutes as strictly as Texas.¹¹ According to Note, "Don't Steal a Turkey in Arkansas—The Second Felony Offender in New York," 45 Fordham L.Rev. 76, 78-79 (1976):

Other states require that the defendant have been previously convicted, sentenced and "placed on probation, paroled, fined or imprisoned. . . ."¹² Florida demands a "formal adjudication of guilt." . . . In other jurisdictions, a verdict or a plea of guilty is all that is necessary to implement added sanctions.¹³ Other opinions indicate that simultaneous, multiple convictions may be used for the purpose of applying recidivist statutes.¹⁴ [footnotes renumbered]

¹⁰ This section is new, however. If the felony is a third degree felony, the trial judge has the discretion under present Texas law to reduce the offense to a first degree misdemeanor. Tex. Penal Code Ann. § 12.44 (Vernon 1974).

¹¹ Iowa's interpretation is similar to the Texas view:

Our statute dictates that each offense must have been complete as to conviction, sentence and commitment to prison before the commission of the next in-order that it qualify for application of the enlarged punishment of [Iowa's habitual offender statute].

State v. Tullman, 228 N.W.2d 38, 41 (Iowa 1975).

¹² *State v. Abernathy*, 515 S.W.2d 812, 814 (Mo.Ct.App. 1974) (emphasis added). Accord, *Lis v. State*, 327 A.2d 746, 748 (Del.Supr. 1974).

¹³ E. g., *Woods v. Mills*, 503 S.W.2d 706 (Ky.Ct.App. 1974).

¹⁴ E. g., *Cox v. State*, 255 Ark. 204, 499 S.W.2d 630 (1973); *State v. Williams*, 226 La. 862, 77 So.2d 515 (1955).

B. Texas Good Time Credit

The panel majority held that it could not consider good time credits. This holding is inconsistent with at least two other Fifth Circuit cases. *Brown v. Wainwright*, 574 F.2d 200, 201 (5 Cir. 1978) substituted opinion 576, 1148 (1978); *Rodriguez v. Estelle*, 536 F.2d 1096, 1097 (5 Cir. 1976).

The majority of the court sitting en banc has determined that *Brown* and *Rodriguez* establish the better rule for several reasons. First, *Brown* and *Rodriguez* are consistent with our view that the court is to look at the system realistically. To ignore the Texas good time system is to close our eyes to reality. Second, to assume Rummel's sentence is one for life absolutely is to import a sentence unknown to Texas law.¹⁵ Third, we cannot assume, even though good time credits are not vested rights, that Texas will act arbitrarily, capriciously and unconstitutionally in administering its good time scheme. Fourth, we note that reasoned authority in other jurisdictions consider the parole probability in reviewing sentences under the eighth amendment. In *Carmona v. Ward*, *supra* at 413-414, the Second Circuit stated:

We cannot agree that the recognized probability of parole in the cases before us was to be ignored when the court determined whether the statutory punishment was unconstitutional as applied to appellees. On the one hand, we are asked to look at all the circumstances which would ameliorate the seriousness of petitioners' offenses and their individual culpability in order to justify a finding that their punishment was constitutionally offensive. On the other hand, we are asked in effect to consider the appellees so incorrigible that they must be deemed destined to durance vile for the rest of their natural lives because they will never be paroled. We do not consider this to be a realistic or practical approach. See 61 Calif.L.Rev. 418, 422 (1973).

We are told that the New York Parole Board is stringent, that it lacks standards and that its determinations are beyond the jurisdiction of the federal court. The suggestion that the federal court act as a New York parole board determining which prisoner should be released and

¹⁵ According to the respondent, only five states—Alabama, Arizona, Delaware, Georgia, and Tennessee—provide for a life sentence without possibility of parole.

under what conditions is not at all palatable as a practical matter, *Wolfish v. Levi*, 573 F.2d 118, 120 (2d Cir. 1978), to say nothing of the offense to the principles of comity and federalism. Cf. *Rizzo v. Goode*, 423 U.S. 362, 378-81, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). This court has properly reviewed cases where state prisoners have alleged denial of due process rights or other constitutional imperfections in parole procedures.¹⁴ There is no reason to anticipate that either the petitioners here will be denied a constitutionally proper parole hearing or that the federal courts will hesitate to intervene if their constitutional rights are violated in the state proceedings. We conclude that in determining the severity of the sentences imposed here we cannot consider them equivalent to life sentences without parole.¹⁵ Rather we must view the punishment as set forth by the statute which provides that the defendants here are eligible for parole, as are all other felons in the state, at the conclusion of their mandatory minimum sentences.

In Texas, a prisoner is eligible for parole after receiving credit for twenty years' imprisonment or after serving one third of his sentence, whichever is less. Tex.Code Crim. Pro.Ann. art. 42.12 § 15(a) (Vernon 1974). Since Rummel is serving a life sentence, he is eligible for parole after accruing credit for twenty years. Texas employs a well-developed system of awarding good time credits. Class I prisoners earn twenty days "good time" per month. Class II prisoners earn ten days "good time" per month, Tex.Civ.St. Ann. art. 61841 (Vernon 1974), and State-approved trusties earn thirty days credit for each thirty days service. Tex. Penal Code Ann. art. 61841 (Vernon 1974). Thus, a State-approved trusty can serve a life sentence in ten years.¹⁶

The State of Texas argues that its "good time" system is the most liberal in the country. Were we to judge this assertion, we would require more study, however, the State has provided us with a compendium of each state's good time credit system, and it appears that the Texas system compares favorably with most jurisdictions.¹⁷ This, we are told, is not an accident nor an example of Texas' munificence, but

¹⁴ Indeed, Rummel has informed this court that he has been a State-approved trusty since March 1, 1977.

¹⁷ We have attached an appendix of various jurisdiction's good time provisions.

a part of a very definite plan. As a popular journal has stated:

Although the prisoners are not permitted by Texas law to earn money for their work, the prison does pay them in time. State Approved Trusties (SAT)—half the inmate population—draw two-for-one good time. Every month they serve puts two months in their time accounts; a man with ten remaining years who is made an SAT serves those ten years in five calendar years. Good time earned also brings parole-eligibility dates closer. The men in the Line are in one of three grades. Lines II and III are disciplinary: Line II draws forty days for every thirty days served, and Line III draws day for day. Everyone else, even men just arriving at the Diagnostic Unit in Huntsville in custody of their county sheriffs, is Line I, which draws fifty days for every thirty served.

Texas has the most liberal good-time laws in the country, which is curious since Texas also gives the longest sentences and is the most reluctant to grant parole.

The good-time grades are particularly important at Ellis, where there are so many men doing heavy time and so few who have much chance of being paroled. A change in grade from SAT to Line III doubles the years ahead to be served. Men with trusty jobs are very careful.

George Beto, Estelle's predecessor as TDC director and now on the faculty in the criminal justice program at Sam Houston State University, used to tell visitors that the administration of good time and the presence of the Line kept inmates working hard in school programs and behaving properly on other jobs.

Jackson, *Hard Times*, Texas Monthly, December 1978, 138 at 258.

Considering Texas' good time system, the inevitable conclusion is that Rummel can be eligible for parole at the end of twelve calendar years, or considering his trusty status, even earlier.

VII.

Both the panel majority and *Hart* looked to the nature of the crime in determining whether a particular legislatively

selected punishment offended the eighth amendment's proportionality element. The en banc majority agrees that looking to the nature of the offense is an inexorable part of proportionality analysis.

Our disagreement with the panel majority is, however, that it failed to apply the first principle of our analysis—that every inference is to be made in favor of the selected punishment and that it erred by looking to the underlying offenses to establish the asserted triviality of the offenses. We adopt the dissent's reasoning that "Rummel was not sentenced to life imprisonment for stealing \$230.00; the life sentence resulted from his having committed three separate and distinct felonies under the laws of Texas." *Rummel v. Estelle*, 568 F.2d 1193, 1201 (5 Cir. 1978) (dissenting opinion). As put another way by the Second Circuit:

The recidivists' statutes which provide for longer sentences for repeat offenders present an example of a penalty created by the legislature because of considerations other than the specifics of the final underlying crime.

Carmona v. Ward, 576 F.2d at 411 n.9.

Rummel asserts that all of his offenses were "nuisance offenses"; if we were to judge this statement, we doubt that we could so blandly characterize his behavior. Manifestly, however, Rummel has demonstrated by his past behavior that he is unable to conform himself to the rules of society. Texas has justifiably found Rummel to be a habitual criminal and has imprisoned him for this reason.

It is beyond peradventure that Texas intends to punish Rummel with at least a ten year sentence. And this does not violate the eighth amendment.¹⁸ Beyond that, the burden is on Rummel to prove by his good behavior and diligent work that he is entitled to a place in free society.¹⁹

VIII.

The panel majority argued that comparison of Rummel's sentence with the sentences imposed in other jurisdictions

¹⁸ See *Davis v. Davis*, 585 F.2d 1226 (4 Cir. 1978); *Wood v. South Carolina*, 483 F.2d 149 (4 Cir. 1973).

¹⁹ Rummel suggests that even if he is paroled, he is still on probation and lifetime probation is in itself cruel and unusual punishment. This argument need not detain us long. We cannot understand how a lifetime requirement of good behavior is too much to ask of a habitual criminal.

confirms the gross disproportionality of Rummel's sentence. 568 F.2d at 1199.

We believe that the evidence on this point is, at best, inconclusive. Of course, if the court is forced to assume that Rummel's sentence is automatically and invariably one for his natural life, then the majority's assertion is probably accurate. However, we have rejected this approach and have held that the likely probability of Rummel's jail term should be compared with the experience of other states. This Rummel has not done, and our research suggests that Rummel's actual jail time would not be significantly longer in Texas than his jail time in many other states.

The record in this case reveals that Rummel was convicted of a fourth felony on the same day he was sentenced under Texas habitual offender statute. Three states²⁰ punish a three time offender with a mandatory life sentence, and three states²¹ provide for a discretionary life sentence for a three time offender. Three states²² punish a four time offender with a mandatory life sentence, and eight states²³ provide for a discretionary life sentence for a four time offender. Given these facts, it appears that up to a possible six states would sentence Rummel to a life term and up to eleven states would give discretion to the court to determine Rummel's sentence.

On the face of the record before us, we feel confident that few if any of the eleven discretionary states would sentence Rummel to the maximum discretionary life term. However, it is most important to remember that the record we have before us was developed under the particularly peculiar Texas system, and since we do not have occasion to examine the full extent of Rummel's record,²⁴ we cannot in complete confidence hold that no one of the discretionary states would

²⁰ Texas Penal Code art. 12.42(d) (Vernon 1974); Wash. Rev. Code § 9.92.090 (perhaps limited by *State v. Lee*, 87 Wash.2d 932, 558 P.2d 236, 240 n.4 (1976) (en banc)); W.Va. Code § 61-11-18 (limited by *Hart*).

²¹ Ark. Stat. Ann. § 14-1001; Idaho Code § 19-2514; Kan. Crim. Code & Code of Crim. Proc. § 21-4504.

²² Colo. Rev. Stat. § 16-13-101; N.M. Stat. Ann. § 40A-29-5; Wyo. Stat. § 6-1.

²³ Alaska Stat. § 12.55.050; La. Rev. Stat. Ann. § 15-529.1; Mich. Comp. Laws § 28.1084, M.C.L.A. § 769.12; Nev. Rev. Stat. § 207.010; N.J. Stat. Ann. § 2A:85-12; N.C. Gen. Stat. § 14-7.1, 7.6; S.D. Compiled Laws Ann. § 22-7-1; Vt. Stat. Ann. tit. 13, § 11.

²⁴ Nor do we have occasion to examine the discretion of the prosecutor in bringing the enhanced indictment. But cf. *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 671-72, 54 L.Ed.2d 604 (Powell, J., dissenting).

sentence Rummel to a life sentence or a sentence that is essentially equal to the one Rummel is serving.

Finally, Rummel has made no attempt to demonstrate what the actual jail times in the various jurisdictions would amount to.²⁵ An example will illustrate our point. Suppose that State A gives a ten year sentence for theft and State B gives a thirty year sentence for the same theft. State A has a practice of fixed and determinate sentence and does not award early release based on good time or discretionary parole. State B, however, is similar to Texas and through long experience it can be shown that the thirty year sentence amounts to about ten years' imprisonment. Can it justifiably be said that State B punishes the theft three times more severely than State A? This court thinks not.

A variation of this very possibility might be found in our own circuit. In Georgia, upon conviction of the fourth felony, the defendant receives the mandatory maximum without parole.²⁶ Ga.Code Ann. § 27-2511. Rummel's equivalent offense in Georgia is theft by deception, Ga.Code Ann. § 26-1803, and the maximum penalty is ten years, Ga.Code Ann. § 26-1812. Considering the no parole provision, Rummel's imprisonment in Georgia would be approximately the same as his imprisonment in Texas.

IX.

The panel majority held that a "[C]omparison of Rummel's sentence with the punishment accorded other crimes under Texas law" highlighted the irrational severity of Rummel's punishment. 568 F.2d at 1199. The majority compared Rummel's underlying crimes with the various Texas penalties selected for a single act. This comparison is inappropriate in this case. If this challenge were to a sentence for one act of theft, then the comparison between the sentence given for the theft and the sentence given for murder or rape would be appropriate. But this is not the case, Rum-

²⁵ Of course, this detailed comparison of actual practices was not required in *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 2867, 53 L.Ed.2d 982 (1977), for obvious reasons.

²⁶ We cannot know definitely if the Georgia enhancement provision would apply to Rummel, but we nevertheless supply this example because there is nothing on the face of the Georgia statute that suggests to us that Georgia would not apply its enhancement statute to Rummel. We wish to underscore the difficulty of comparing the various enhancement statutes to each other.

mel's sentence resulted from his status as a habitual criminal.

X.

Finally, the panel majority adopted from *Hart* a test that "seeks to determine whether a *significantly* less severe punishment could achieve the purposes for which the challenged punishment is inflicted." 568 F.2d at 1198 citing *Hart*, 483 F.2d at 141. We reject that test as a part of the appropriate proportionality analysis.

This test was taken from Justice Brennan's concurring opinion in *Furman v. Georgia*, 408 U.S. 238, 300, 92 S.Ct. 2726, 2757-2758, 33 L.Ed.2d 346 (1972). Mr. Justice Brennan's opinion stated a "lack of necessity" test or a "less drastic means" test: "Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime, the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment."²⁷

This test has never commanded a majority in the Supreme Court, even in death cases. And the very circuit that has given us *Hart* declared, in *Hall v. McKenzie*, 537 F.2d 1232, 1235 (4 Cir. 1976), that death "occupies a special place in eighth amendment jurisprudence."

We believe that this passage from Wheeler, "Toward a Theory of Limited Punishment II: The Eighth Amendment After *Furman v. Georgia*," 25 Stanford L.Rev. 62, 77-78, succinctly expresses our reasons for not adopting the *Hart* "lack of necessity" test.

The Brennan-Marshall necessity test is even more impractical in other eighth amendment adjudication, where the empirical data and long usage associated with capital punishment are absent. If a convict were to challenge the length of his prison sentence or the length of the statutory maximum as being unnecessary to deter potential criminals from committing the same crime he committed, I am convinced that the government could never show that 10 years' imprisonment deters more effectively than 5 years' imprisonment or that one year in jail deters more effec-

²⁷ Mr. Justice White expressed a similar sentiment, 408 U.S. 238, 311, 92 S.Ct. 2726, 2763, 33 L.Ed.2d 346, and, Mr. Justice Marshall *id.* at 331, 92 S.Ct. at 2773.

tively than a \$500 fine. The problem would be even more substantial for a new punishment. If the government attempted to employ a new punishment, it would be impossible to adduce empirical data proving its necessity for deterrence purposes. Thus, if the purpose of the punishment was to increase deterrence, it would be unconstitutional because its necessity was unproved.

XI.

Perhaps, the Texas habitual offender law and the Texas scheme that has developed under the law is not in accord with notions of modern penology,²⁸ but our task is not to prod the State into adopting the latest theory of penal reform. The science of penology is an imprecise one that offers us few sure answers. The Supreme Court has said this many times but the best statement is from *Gore v. United States*,

In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, see Radzinowicz, *The History of English Criminal Law: The Movement for Reform, 1750-1833, passim*, these are peculiarly questions of legislative policy.

357 U.S. 386, 78 S.Ct. 1280, 1285, 2 L.Ed.2d 1405.

The legislature in our society selects the punishment scheme and we are justified to strike down the legislature's choice only when the petitioner demonstrates that the legislative choice has no rational basis and is totally and utterly rejected in modern thought. So long as there is room for debate, the choice of the legislature will not be overturned. Rummel places great reliance on the fact that all of his crimes were nonviolent. If a state were to limit its recidivist statute to only those who have been convicted of violent crimes,²⁹ the state would have made a rational choice

²⁸ See e. g., Katkin, *Habitual Offender Laws: A Reconsideration*, 21 Buffalo L. Rev. 99 (1971); Furgeson, *The Law of Recidivism in Texas*, 13 McGill Law Journal 663, 665 (1967); Note, *The Treatment of the Habitual Offender*, 7 U. Richmond L. Rev. 525 (1973).

²⁹ Moreover, this is to totally ignore the difficulty in determining the line between crimes that are violent or have a potential for violence or present a

and perhaps a more rational choice than it has made in Article 63. But Rummel cannot gain any advantage by positing a more rational system than the one in existence: He must demonstrate that the system in existence is an irrational one.

After three felony convictions and two ineffectual prison terms, the State of Texas has chosen to place the burden on the offender to prove his entitlement to a place in society. This is not an irrational choice, and to many, one that is not particularly callous. We do not think that Texas has adopted a system that is cruel and unusual in violation of the eighth amendment, even as applied to William Rummel.

XII.

Rummel also alleges that his trial counsel was ineffective at his state trial. The panel did not reach this issue, and we deem the issue unworthy for en banc treatment in the first instance. We therefore remand this issue to the panel for its decision on this matter.

XIII.

We affirm the district court's denial of habeas corpus relief on the eighth amendment issue. We remand the sixth amendment issue to the panel for its original consideration.

AFFIRMED in part; REMANDED to the panel in part.

Appendix to follow.

strong social interest. While we have not carefully surveyed the Texas Penal Code, it appears that there are approximately forty-five third degree felonies. In combinations of three, this yields 45,190 possibilities, and sooner or later, this court could expect to see many of them.

Finally, by what authority does Rummel denigrate the interest society has in punishing his crimes? Certainly, Rummel's victims see the important social interest in deterring his behavior. Would there be a greater social interest if Rummel were to have stolen \$2,300, \$23,000, or \$230,000 rather than the \$230 he actually stole? Is it less serious to steal \$230 from an elderly widow than to steal \$2,300,000 from the First National Bank?

APPENDIX

According to the State, the following are selected examples of various jurisdiction's good time provisions.

I State	II Law First Passed	III Rate of Good Time Allowances	IV Types of Additional Good Time Allowances	V Rate of Additional Good Time Allowances	VI Offender Ineligible for Good Time	VII Effect on Parole Eligibility	VIII Effect on Discharge and/or Release
Ala.	1843 6mo-1 yr 1-3 yr 3-5 yr 5-10 yr	5days/mo 6days/mo 7days/mo 8days/mo	Meritorious In- dustrial Pro- duction	1st yr 3days/mo 2nd, 3rd, 4th yr 4days/mo 5th yr 5days/mo	Life Murder 1st	No effect	Credited to maximum sentence to advance conditional release
	Remaining	10days/mo	Blood Donation	30 days/yr			
Cal.	Repealed None 1948						
D.C.	1901 1mo-1 yr 1-3 yr 3-5 yr 5-10 yr 10th Remaining	5days/mo 6days/mo 7days/mo 8days/mo 10days/mo 10days/mo	Blood Donation Meritorious con- duct, volunteer programs, in- dustrial	30 days/yr Lump sum or 1st yr 3days/mo 2nd+yr 5days/mo	Life	No effect	Credited to maximum sentence to advance conditional release
Fla.	1871 1st yr 2nd yr 3rd yr 4th yr 5th yr Remaining	5days/mo 5days/mo 10days/mo 10days/mo 15days/mo 16days/mo	Extra gain time Special gain time Special gain time	1-6 days/mo 1-15 days/mo 1-60 days flat reduction	All eligible	No effect	Credited to maximum sentence to advance conditional release

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Ga.	1856 1st yr 2nd yr 3-10 yr Remaining	1mo/yr 2mo/yr 3mo/yr 4mo/yr	Exemplary con- duct	Set by board of corrections	Life	No effect	Credited to minimum sentence to advance conditional release
Ia.	1842 25days/mo flat	None			Life	No effect	Credited to maximum sentence to advance discharge
Minn.	1892 1st yr 2nd yr 3rd yr 4th yr 5th yr 6th yr 7th yr 8th yr 9th yr 10th yr Remaining	3days/mo 4days/mo 5days/mo 6days/mo 7days/mo 8days/mo 9days/mo 10days/mo 11days/mo 15days/mo 15days/mo	Extra meri- torious conduct Overtime or Sunday work Blood Donation	Increase allow- ances Equivalent allowances	All eligible	No effect	Credited to maximum sentence to advance discharge
N.Y.	1817 Rate determined by good time allow- ance committee not to exceed 1/3 of the maximum on an inde- minute sentence	Meritorious con- duct, extra work	Rate determined by commissioneer of corrections	Life	No effect	Credited to maximum sentence to advance conditional release	

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Texas 1931	Class I 20days/mo	Trusty	30 days/mo	All eligible	Credited to maximum sentence to advance parole eligibility	Credited to maximum sentence to advance discharge	
	Class II 10days/mo						
	Class III None	Blood Donation	30 days				
W.Va. 1968	1 yr 5days/mo	Meritorious conduct	9½ days/mo	Life	No effect	Credited to maximum sentence to advance discharge	
	1-3 yrs 6days/mo						
	3-5 yrs 7days/mo						
	5-10 yrs 8days/mo						
	Remaining 10days/mo						
Federal 1967	6mo-1yr	5days/no	Camp good time, 1st yr 3days/mo	All eligible	No effect	Credited to maximum sentence to advance conditional release	
	1-3 yrs	6days/no	Work release	2nd and Remaining 5days/mo			
	3-5 yrs	7days/no	Good time,				
	6-10 yrs	8days/no	Community Treatment Cen-				
	Remaining	10days/mo	ter good time,				
			Industrial good time, Meritorious good time, special award good time,				
			Good time earned at other state institutions: military, state, D.C.				

CHARLES CLARK, Circuit Judge, with whom GOLDBERG, GODBOLD, JAMES C. HILL, ALVIN B. RUBIN and VANCE, Circuit Judges, join, dissenting:

In Part VIII the majority concedes that "if the court is forced to assume that Rummel's sentence is automatically and invariably one for his natural life, then the [assertion that the sentence is grossly disproportionate to Rummel's crimes] is probably accurate." Nevertheless, the court decides that Rummel's life sentence is not in fact a life sentence because of Texas' good time credit system and the possibility of parole. The court reasons that it should not be concerned with "academic possibilities" but with the "real world."

But what is real and what is academic? The State of Texas has sentenced William Rummel to spend the rest of his life in the penitentiary. If parole ever comes, it comes at the sheer grace of the State. In Rummel's real world, it is not the possibility that Texas will grant him parole that governs his future. Rather, it is the existing order requiring that he be held in custody until he dies. The eighth amendment either bars affixing the sentence for Rummel's crimes or it does not. If Rummel has a constitutional right to interdict his prison term, this court must declare that right's existence without regard to the possibility that Texas, by an act of executive grace, may grant him parole.

A.

At the outset it is important to note that the critical factor in determining how to regard Rummel's life sentence is not the Texas system for awarding good time credit but the Texas system for granting parole. The majority refers to the good time credit system and parole interchangeably, and it relies to a large extent on the relative liberality of the Texas good time credit system. The two systems embody totally different concepts, however, and they have special meanings in the context of a life sentence. Good time credit results in the early release of a prisoner under a sentence to a fixed term of years. For example, one serving a twenty-year sentence may be released after only ten years actual jail time if he has accumulated ten years of good time credit. A person committed for life, however, cannot have his prison term reduced by good time credit. Because the length of

his sentence is fixed by the span of his life, there is no fixed term from which his credit can be subtracted. No amount of accumulated good time credit entitles a man serving a life sentence to a release from prison because of credit accumulated.

The only chance for release such a life sentence prisoner has is parole. Texas law specifically provides that parole is not considered a reduction in sentence, Tex. Code Crim. Pro. Ann. art 42.12 § 22 (Vernon Supp. 1966-1977); the sentence remains in effect during its entire period even if parole is granted. *Ex parte Lefors*, 165 Tex.Cr.R. 51, 303 S.W.2d 394 (1957). Unlike good time credit, which is an enforceable statutory entitlement subject to constitutional due process protection, *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) parole is a matter of executive grace which constitutional due process does not protect. *See part B, infra.*

Even under the court's own premise that it should measure probabilities rather than legally enforceable rights, however, the court's juxtaposition of Texas' good time credit system with its parole system tends both to confuse and to underscore Rummel's plight. Although it is true that Texas' good time credit system may benefit Rummel by causing his eligibility for parole consideration to come earlier than may be the case in other jurisdictions, Rummel's chances for parole once he becomes eligible are by no means better than they would be in other places. According to the authority quoted in the majority opinion, "Texas . . . gives the longest sentences and is the most reluctant to grant parole." *Supra* p. 658.

Ultimately, however, the constitutional issue should not turn on how good Rummel's chances for parole consideration may be, but on the fact that they are only chances.

B.

A convict is deemed to have been constitutionally deprived of all right to liberty for the length of his sentence, subject only to whatever legal entitlements he may have under state or federal law. *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1976); *Montanye v. Haymes*, 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976). The possibility of parole is not such an entitlement because it has no legal effect on the right of Texas to confine Rummel.

"Parole is an act of grace of the sovereign," *Clifford v. Beto*, 464 F.2d 1191, 1195 (5th Cir. 1972), that "cannot be demanded as a right." *Jay v. Boyd*, 351 U.S. 345, 76 S.Ct. 919, 924-25, 100 L.Ed. 1242 (1956); *Escoe v. Zerbst*, 295 U.S. 490, 55 S.Ct. 818, 819, 79 L.Ed. 1566 (1935). Historically, parole in the United States evolved from the practice of the King of England to grant conditional pardons, C. Newman, *Sourcebook on Probation, Parole and Pardons* 18-19 (3d ed. 1972). In Texas, parole is still classified as a conditional pardon. *Ex parte Lefors*, 165 Tex.Cr.R. 51, 303 S.W.2d 394 (1957); *Clifford v. Beto*, 464 F.2d 1191, 1194 (5th Cir. 1972).

Since parole is totally an act of grace by the state, there is no legal basis for judicial intervention in the merits of parole decisions. The Due Process clause of the Constitution only applies to property interests or liberty interests that are established "entitlements." *E. g., Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). This court has repeatedly emphasized that Texas prisoners do not have any entitlement in the nature of a liberty or property interest in their expectancy of release on parole. *Johnson v. Wells*, 566 F.2d 1016, 1018 (5th Cir. 1978); *Craft v. Texas Board of Pardons and Paroles*, 550 F.2d 1054 (5th Cir. 1977). We have frequently distinguished the mere hope of being granted parole from the limited liberty interest that accrues after parole has been granted by steadfastly refusing to extend the minimal due process protection applicable to parole revocation to the initial determination by parole boards on whether to grant parole. *Shaw v. Briscoe*, 541 F.2d 489 (5th Cir. 1976); *Cook v. Whiteside*, 505 F.2d 32 (5th Cir. 1974); *Clifford v. Beto*, 464 F.2d 1191, 1196 (5th Cir. 1972). Thus, we have refused to equate "the possibility of conditional freedom with the right to conditional freedom." *Scarpa v. United States Board of Parole*, 477 F.2d 278 (5th Cir.), vacated for consideration of mootness, 414 U.S. 809, 94 S.Ct. 79, 38 L.Ed.2d 44 (1973), dismissed as moot, 501 F.2d 992 (1973). The most thorough statement of this position is in *Brown v. Lundgren*, 528 F.2d 1050, 1052-1053 (5th Cir. 1976):

At the constitutional level, there is a clear distinction between the loss of a statutory privilege once obtained

and the denial of that same privilege, never given. While the threatened loss of a privilege may be "grievous" and therefore require some degree of procedural due process protection, see, e. g., *Morrissey v. Brewer*, 1972, 408 U.S. 471, 482, 92 S.Ct. 2593, 33 L.Ed.2d 484, the denial of that privilege may only be subject to the procedural demands of the particular enabling statute. Thus, while parole revocation and prison discipline are clearly within the ambit of the Due Process Clause of the Fifth and Fourteenth Amendments, the mere expectation of parole release while still in otherwise lawful custody is not so vested as to result in a "grievous loss" if denied by the parole board. . . .

In any context where it is asserted that constitutional due process is required, the basic, threshold question is whether there is a "grievous loss" of either a liberty or property interest. If there is no such loss, then the second question of whether the particular challenged procedure comports with fundamental fairness is never reached. In short, we find that the denial of parole as distinguished from the revocation of parole as in *Morrissey*, supra, is not a "grievous loss," and we therefore do not consider whether the procedures of the parole board deny constitutional due process.

Other circuits have taken the same position as *Brown*. The Ninth Circuit has stated:

The legally convicted prisoner has no vested right to determination of his sentence at less than maximum, nor to parole. . . . No rigid or even measurable criteria dictate that a particular individual must have his sentence set at less than the maximum term. These same principles apply to the granting of paroles.

Dorado v. Kerr, 454 F.2d 892, 897-98 (9th Cir. 1972). The Second Circuit has said that the prisoner seeking parole "neither enjoys freedom from prison walls nor is entitled to it." *Walker v. Oswald*, 449 F.2d 481, 485 (2nd Cir. 1971). In *Menechino v. Oswald*, 430 F.2d 403, 408-409 (2nd Cir. 1970), that Circuit reasoned that a prisoner seeking parole was like an alien seeking entry into the United States.

As a matter of law, Rummel's sentence deprives him of all right to liberty for the rest of his life.¹ To treat Rummel's sentence as one to serve less than life is, analytically,

no different from treating a death sentence as imposing a milder punishment because of the possibility of an executive pardon. *Carmona v. Ward*, 576 F.2d 405, 420 (2nd Cir. 1978) (Oakes, J., dissenting). Rummel's future chance for parole has no legal significance, it is merely a statistical possibility of clemency, an unenforceable hope that he may someday benefit from the grace of a parole board.² The eighth amendment demands that Rummel's claim be judged by the law of rights and duties, not the law of probabilities.

C.

Not only is Rummel's sentence not legally ameliorated by the possibility of parole, but his actual chances of being paroled have little to do with the crime for which he was sentenced. They largely depend on his *subsequent* behavior in prison. If he ever does gain parole, his *subsequent* behavior outside of prison, even if non-criminal, may result in revocation and return to prison forever. Tex. Code Crim. Pro.Ann. art. 42.12 § 22. (Vernon Supp. 1978).

Texas repeatedly emphasizes that Rummel has a good chance of parole eligibility in 10 to 12 years, implying by its protestations that 10 to 12 years would adequately serve the

¹ The cases cited on this issue in our own circuit as well as the Ninth and Second Circuits clearly rely on the classic right-privilege distinction, a distinction that has drawn scholarly and judicial attack. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 482, 92 S.Ct. 2593, 2601, 33 L.Ed.2d 484 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 262 and n.8, 90 S.Ct. 1011, 1017, 25 L.Ed.2d 287 (1970); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968). However, the Supreme Court's more recent pronouncements in the due process area, *Roth*, *Sindermann*, and *Bishop*, supra, clearly require the existence of a legal entitlement to a property or liberty interest before the due process clause applies. The entitlement doctrine is in fact the right-privilege distinction resurrected in new verbal garb. See generally Note, *Democratic Due Process: Administrative Procedure After Bishop v. Wood*, 1977 Duke L.J. 453. Whatever the hope of release on parole may be labeled, under the cases cited in the text, it definitely does not rise to the level of a "right" or an "entitlement" and it definitely confers no legally protectable interest on the prisoner.

² The California Supreme Court in *In re Lynch*, 8 Cal.3d 410, 419, 105 Cal. Rptr. 217, 223, 503 P.2d 921, 926 (1972), held that a life sentence with parole had to be treated as a life sentence for the purposes of eighth amendment analysis. One of the factors relied on by the court was the fact that the penological function of parole is only to mitigate a punishment which would otherwise be deserving. 105 Cal.Rptr. at 217, 503 P.2d at 921. The holding in *Lynch* was followed by New York in *People v. Broadie*, 37 N.Y.2d 100, 110, 371 N.Y.S.2d 471, 474, 332 N.E.2d 338, 341 (1975).

state's penological interests. The majority's intimation that Rummel's case is an attractive one for relatively early parole also suggests that insofar as Rummel's punishment is considered in connection with his crimes alone, a life sentence would be disproportionate. Indeed, the court concedes that if it considered his sentence one for life, it would be grossly disproportionate. It relies on Rummel's chances for something less. The state's equation then, is that if Rummel's three crimes do not in themselves justify life imprisonment, three crimes plus subsequent bad behavior in prison would.

It is almost certain to the state that if Rummel does serve the rest of his natural life in jail, it will not be for the crimes for which his sentence was imposed, but rather for other reasons. These reasons the world may never know. No public record need show which of an infinite number of reasons caused Rummel to fall into disfavor with the parole board. He may by laziness or insolence make enemies of prison authorities. His personality may cause trouble with other prisoners. Many forms of behavior which bring discipline in prison are not criminal in the outside world. Rummel has no recourse if the parole board in its virtually unfettered discretion is never moved to release him or tell him why it did not.³

Parole, if it does come, is in no way equivalent to the freedom of an ordinary citizen. The conditions imposed on the parolee are wide-ranging, and any violation may result in a return to prison. The Supreme Court described typical parole restrictions in *Morrissey v. Brewer, supra*, 92 S.Ct. at 2598-99:

Typically, parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically, also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor

³ The substantive standard applied by the board is "the best interest of society," Tex. Code Crim. Pr. Ann. art. 42.12 § 22. The situation is not novel. In 1637, the annals of the General Court of the Massachusetts Bay Colony record the following dialogue in the Banishment of Anne Hutchinson:

"Ms. Hutchinson: I desire to know wherefore I am banished.

"Gov. Winthrop: Say no more. The court knows wherefore and it is satisfied."

vehicle, traveling outside the community, and incurring substantial indebtedness. Additionally, parolees must regularly report to the parole officer to whom they are assigned and sometimes they must make periodic written reports of their activities.

There is no way for this court to predict whether, in the event that he is paroled, Rummel will run afoul of some parole restrictions which again would not constitute criminal behavior. In *Morrissey* the Court stated that it is estimated that 35-45 percent of all parolees are returned to prison for parole violations. 92 S.Ct. at 2599, citing President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 62 (1967). Rummel will have to toe any line the parole board may draw during his time in prison to have any chance at parole, and he will have to continue to toe its line for the rest of his life to maintain any limited freedom he may gain as a parolee. Rummel has no right to pay a constitutional penalty for his crimes and be done with them. See *Weems v. United States*, 217 U.S. 349, 366-67, 30 S.Ct. 544, 54 L.Ed. 793 (1909).

A person who receives a twelve-year sentence for a crime in Texas and is totally recalcitrant in his behavior while in prison can do no worse than serve his whole twelve years. The parole board may choose not to let him out early, but it cannot make him stay longer than the term of his sentence. What that person may do after his term is served, so long as it is not criminal, is his own business. If Rummel's offenses, standing alone, only justify a maximum sentence to a term of years, then he should be able to serve those years and be done with them, no matter what the parole board thinks of him. But that is not Rummel's condition. Texas has deprived Rummel of any legally enforceable right to his freedom for his entire life and the chances for grace are perilous and without protection of law.

The Constitution says that his sentence should not stand if lifetime deprivation of freedom is grossly disproportionate to his crimes.

D.

Although the Supreme Court has never dealt with the proper construction of a sentence with a chance of parole for the purposes of the eighth amendment, the Court has

treated the problem in reviewing sentences under the *ex post facto* clause. U. S. Const. art. I, § 10. In *Lindsey v. State of Washington*, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937), the Court reviewed a conviction from the State of Washington. At the time the petitioner, Lindsey, had committed his crime of larceny, the law provided for the sentence to be fixed by the trial judge at a minimum of 6 months and a maximum of 15 years. Parole was authorized in the discretion of the parole board at any point prior to the expiration of the sentence received. At the time Lindsey was sentenced, however, the law had been changed to a scheme similar to the present Texas system. A mandatory 15-year sentence was provided. At the same time, however, the statute provided that "a convicted person may be released on parole by the board after he has served the period of confinement fixed by the board, less time credits for good behavior and diligence." 301 U.S. at 399, 57 S.Ct. at 798. The Supreme Court held that in determining the constitutionality of the sentence the contingent possibility of parole was irrelevant; the constitutionality of the sentence had to be measured by the mandatory statutory maximum of 15 years:

The effect of the new statute is to make mandatory what was before only the maximum sentence. Under it the prisoners may be held to confinement during the entire fifteen-year period.. Even if they are admitted to parole, to which they become eligible after the expiration of the terms fixed by the board, they remain subject to its surveillance and the parole may, until the expiration of the fifteen years, be revoked at the discretion of the board or canceled at the will of the governor. It is true that petitioners might have been sentenced to fifteen years under the old statute. But the *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed.

301 U.S. at 400-401, 57 S.Ct. at 798-99. The Supreme Court went on to acknowledge the difference between a release from prison after a number of years at the end of a sentence and release from prison after the same number of years on parole:

Removal of the possibility of a sentence of less than fifteen years, at the end of which petitioners would be

freed from confinement and tutelage of a parole revocable at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. . . . It is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the fifteen-year term.

Id. at 401, 57 S.Ct. at 799. The continued vitality of the *Lindsey* holding was confirmed in the Supreme Court's recent opinion in *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), in which the Court said with reference to *Lindsey*:

Even though under the new statute a convict could be admitted to parole at a time far short of the expiration of his mandatory sentence, the Court observed that even on parole he would remain "subject to the surveillance" of the parole board and that his parole itself was subject to revocation.

97 S.Ct. at 2301. Although *Lindsey* and *Dobbert* were decided under the *ex post facto* clause and not the eighth amendment, their reasoning is fully applicable to Rummel's case.

E.

When the petitioner's punishment is correctly characterized as a life sentence, its excessiveness is striking even with the greatest deference to the state's legitimate interests in punishing recidivism. My views on the unconstitutional disproportionality of the sentence were set forth in the original panel opinion:

The legislative objective of punishing recidivists certainly is legitimate. However, in view of the dramatically lower minimum penalties that Texas imposes upon defendants who commit even the most violent crimes short of capital murder and even upon defendants with a second conviction and a prior offense involving violent second-degree felonies, it clearly appears that a significantly less severe penalty would fulfill the legislative objectives of protecting citizens and deterring crime. The recent reclassification of Rummel's third offense as a misde-

meanor under Texas law buttresses this view. That at most two other states and perhaps none would require life imprisonment for a defendant in Rummel's circumstances confirms the constitutional disproportionality of the sentence given Rummel.

Rummel v. Estelle, 568 F.2d 1193, 1200 (5th Cir. 1978).

The sentence which Texas imposed is society's judgment and, if upheld, society has every legal right to enforce it. If Texas chooses to make good the threat which the sentence itself imposes, no court may be a refuge for Rummel. We may speculate as to Rummel's likely fate, but these guesses are without constitutional significance. "The threat makes the punishment obnoxious." *Trop v. Dulles*, 356 U.S. 86, 102, 78 S.Ct. 590, 599, 2 L.Ed.2d 630, 643 (1957).

It is true that Rummel's severe sentence arises not merely from the inherent nature of his crimes but from the fact that his felonies were three in number. It is equally true that Texas may treat recidivists more harshly than other offenders and that the Texas statute on its face is constitutional. *Spencer v. Texas*, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967). But Rummel is not Spencer. Nor is the constitutionality of Texas' imposition of life imprisonment on Spencer a determination that life imprisonment can constitutionally be imposed on Rummel. Recidivism is no talisman that justifies life imprisonment for any three felonies without regard to their underlying seriousness.

William Rummel is now sentenced to life imprisonment because, in addition to a 1973 conviction for obtaining \$120.75 by false pretences, he had previously been convicted in 1969 for passing a forged check for \$28.36 and in 1964 for credit card fraud involving \$80.00. Even when enhanced by the fact that Rummel repeated his petty cheating conduct three times over a period of nine years, the action of the State of Texas in ordering him imprisoned until he dies is so shockingly disproportionate to his offenses that I am obliged to respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-2946

WILLIAM JAMES RUMMEL,
Petitioner-Appellant,

versus

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for the
Western District of Texas

ON PETITION FOR REHEARING
(March 9, 1979)

Before BROWN, Chief Judge, COLEMAN, GOLDBERG,
AINSWORTH, GODBOLD, CLARK, RONEY, GEE,
TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit
Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

CHIEF JUDGE

* Judge Thornberry was a judge in regular active service on the en banc court when the decision in this cause was rendered. Subsequently Judge Thornberry took Senior Status. On October 20, 1978 the Omnibus Judgeship Bill, Public Law 95-486 (95th Congress) was approved. Judge Thornberry did not participate in this decision.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 76-2946

D. C. DOCKET NO. SA-76-CA-20

WILLIAM JAMES RUMMEL,
Petitioner-Appellant,
versus
W. J. ESTELLE, JR., Director, Texas Department of
Corrections,
Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas

Before BROWN, Chief Judge, THORNBERRY, COLE-
MAN, GOLDBERG, AINSWORTH, GODBOLD,
CLARK, RONEY, GEE, TJOFLAT, HILL, FAY,
RUBIN, and VANCE, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on respondent-appellee's petition for rehearing en banc and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court en banc that the District Court's denial of habeas corpus relief on the eighth amendment issue in this cause be, and the same is hereby affirmed. The sixth amendment issued is remanded to the panel for its original consideration;

December 20, 1978

Clark, Circuit Judge, dissenting, with whom Goldberg, Godbold, Hill, Rubin and Vance, Circuit Judges, join.
Issued As Mandate: MAR 19 1979

SUPREME COURT OF THE UNITED STATES

No. 78-6386

William James Rummel,
Petitioner,

v.

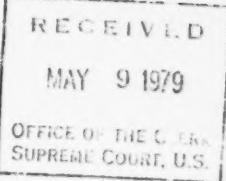
W. J. Estelle, Jr., Director, Texas
Department of Corrections

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

May 21, 1979

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MAY 9 1979



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. 78-6386

WILLIAM JAMES RUMMEL,
Petitioner

v.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

* * *

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

TED L. HARTLEY
Executive Assistant Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

GILBERT PENA
Assistant Attorney General

DOUGLAS M. BECKER
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 78-6386

* * *

WILLIAM JAMES RUMMEL,
Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

* * *

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Attorney General of Texas, on behalf of W. J. Estelle, Jr., respectfully requests that the Court deny the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals affirming the judgment of conviction on direct appeal is Rummel v. State, 509 S.W.2d 630 (Tex.Crim.App. 1974) and is reproduced in Petitioner's Appendix to the petition for writ of certiorari at 49a. The unpublished opinion of the state convicting court denying the state application for writ of habeas corpus was entered on July 25, 1975, and is reproduced in Petitioner's Appendix at 45a. The unpublished order of the Texas Court of Criminal Appeals denying the state petition for writ of habeas corpus on the findings of the trial court was entered on September 23, 1975, and is reproduced in Appendix at 44a.

The unpublished opinion of the United States District Court for the Western District of Texas, San Antonio Division, denying Petitioner's federal application for writ of habeas corpus was entered on May 14, 1976, and is reproduced in Appendix at 39a. The panel opinion of the United States Court of Appeals for the Fifth Circuit reversing the denial of habeas corpus relief is Rummel v. Estelle, 568 F.2d 1193 (5th Cir. 1978). The en banc opinion of the Fifth Circuit--the opinion that Petitioner would have the Court review--affirming the district court's denial of habeas corpus relief on the Eighth Amendment issue and remanding the Sixth Amendment issue to the panel for its original consideration is Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978). Finally, the Fifth Circuit panel opinion on the Sixth Amendment issue that is not raised in the petition for writ of certiorari is Rummel v. Estelle, 590 F.2d 103 (5th Cir. 1979).

JURISDICTION

Petitioner's assertion is correct that the Court under 28 U.S.C. §1254(1) has jurisdiction over the judgment entered by the en banc United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED

The following questions are presented for review:

- A. WHETHER PETITIONER HAS PROCEDURALLY DEFAULTED ANY RIGHT TO CHALLENGE HIS PUNISHMENT AS CRUEL AND UNUSUAL BY FAILING TO OBJECT TO ENHANCEMENT UPON THAT OR ANY OTHER BASIS AT HIS TRIAL?
- B. WHETHER PETITIONER'S SENTENCE OF LIFE IMPRISONMENT IS CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT?
- C. WHETHER THE PROSECUTOR VALIDLY EXERCISED HIS DISCRETION TO SEEK A SENTENCE OF LIFE IMPRISONMENT FOR PETITIONER, WHO THE RECORD REFLECTS IS A HABITUAL CRIMINAL TOTALLY INCAPABLE OF CONFORMING HIS CONDUCT TO THE NORMS OF CIVILIZED SOCIETY?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner cites the Eighth Amendment; Art. 63, V.A.P.C. (1925); Art. 12.42(d), V.T.C.A. Penal Code (1974); and various other state statutes, all of which he sets out in Appendix at 56a. Respondent relies upon the Texas parole and good time credit statutes, Art. 42.12, §15(a), V.A.C.C.P., and Art. 6181-1, §3, V.A.C.S., respectively:

[T]he Board is hereby authorized to release on parole, with the approval of the Governor, any person confined in any penal or correctional institution of this State, except persons under sentence of death, who has served one-third of the maximum sentence imposed, provided that in any case he may be paroled after serving 20 calendar years. Time served on the sentence imposed shall be the total calendar time served and all credits allowed under the laws governing the operation of the Department of Corrections, and executive clemency. All paroles shall issue upon order of the Board, duly adopted and approved by the Governor.

Art. 42.12, §15, V.A.C.C.P.

(a) Inmates shall accrue good conduct time based upon their classification as follows:

(1) 20 days for each 30 days actually served while the inmate is classified as a Class I inmate;

(2) 10 days for each 30 days actually served while the inmate is classified as a Class II inmate; and

(3) 10 additional days for each 30 days actually served if the inmate is a trusty.

(b) No good conduct time shall accrue during any period the inmate is classified as a Class III inmate or is on parole or under mandatory supervision.

Art. 6181-1, §3, V.A.C.S.

Respondent additionally by reference relies upon the good time and parole statutes of all other American criminal jurisdictions, as well as, if necessary, those of any "other western nation." (See petition for writ of certiorari at 13.)

STATEMENT OF THE CASE

The relevant facts are adequately set forth in the panel opinion, Rummel v. Estelle, 568 F.2d 1193, 1195 (5th Cir. 1978), as quoted in the en banc opinion, Rummel v. Estelle, 587 F.2d 651, 653 (1978):

In January 1973, a Texas grand jury indicted Rummel for the felony offense of obtaining \$120.75 under false pretenses. The indictment also charged him with having two prior felony convictions: in 1964 he presented a credit card with the intent to defraud of approximately \$80, and in 1969 he passed a forged instrument with a face value of \$28.36. Rummel pled not guilty to the false pretense indictment, but a jury found him guilty as charged. After the state proved his two prior convictions, Rummel received an enhanced sentence of life imprisonment under the Texas habitual criminal statute then applicable, Tex.Penal Code Ann. art. 63 (Vernon 1925). On appeal, the Texas Court of Criminal Appeals affirmed his conviction. Rummel v. State, 509 S.W.2d 630 (Tex.Cr.App. 1974). Rummel applied for postconviction relief and raised in the Texas courts the issues now before us, but his application was denied without a hearing. Then Rummel sought habeas corpus relief in the federal district court, which also denied his petition without a hearing. (footnote omitted)

REASONS FOR DENYING THE WRIT

I.

THE OPINION BELOW DOES NOT SERIOUSLY CONFLICT WITH THAT OF ANOTHER CIRCUIT COURT OF APPEALS.

The petition avers that the opinion below directly conflicts with that of the United States Court of Appeals in Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 938 (1974). No serious conflict is shown. Hart embraced the concept of proportionality in sentencing and established a four-prong test for determining whether a particular punishment is so grossly disproportionate to the severity of the underlying offense as to constitute cruel and unusual punishment proscribed by the Eighth Amendment. That test focuses upon (1) the nature of the offense; (2) the legislative purpose of the statute and whether a significantly less severe penalty might accomplish that purpose; (3) the punishment that the defendant might have received in other jurisdictions for the same offense; and (4) the punishments prescribed in the same jurisdiction for other offenses.

The en banc opinion in Rummel likewise agreed that some criminal sentences can be so disproportionate as to amount to cruel and unusual punishment. Rummel at 655. The Court then adopted wholly the first, third, and fourth portions of the Hart test. The Court rejected the second prong in recognition of the impossible burden it imposes upon the state and because a majority of this Court had never adopted it, even in death penalty cases. Id. at 661.

The Fifth Circuit next substituted the traditional rational basis test for justifying a state punishment scheme. In essence, this substitution merely shifts the burden of proof for one of the four elements of a test for the application of the proportionality in sentencing concept that both the Fourth and Fifth Circuits have adopted.

This difference simply poses no serious conflict between the Circuits justifying plenary consideration or corrective action by the Court. Any difference in the results of cases is far more likely to be correctly explained in terms of differing fact situations than any minor difference in the applicable legal tests. This conclusion is greatly strengthened by examination of Hart's progeny in the Fourth Circuit, Davis v. Davis, 585 F.2d 1226 (4th Cir. 1978); United States v. Williamson, 567 F.2d 610 (4th Cir. 1977); Hall v. McKenzie, 537 F.2d 1232 (4th Cir. 1976); Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975), cert. denied, ___ U.S. ___, 96 S.Ct. 1733 (1976); Griffin v. Warden, 517 F.2d 756 (4th Cir. 1975); and Wood v. South Carolina, 483 F.2d 149 (4th Cir. 1973). These cases show a consistent refusal to apply Hart in a variety of contexts. Cf. Roberts v. Collins, 544 F.2d 168 (4th Cir. 1976).

In spite of Petitioner's protestations as to the importance of the question (Petition at 16-18), the outcome of the cases in the Fifth and Fourth Circuits has been remarkably similar. Petitioner has shown no fundamental difference in the approaches of these courts.

THE OPINION BELOW CORRECTLY IMPLEMENTS PRIOR AUTHORITIES EMANATING FROM THIS COURT.

The Court has never invalidated a sentence in a criminal case solely because of its length. Petitioner argued in the court below that dicta in several cases had suggested, however, that this Court might do so in a proper case.

E.g., Coker v. Georgia, 433 U.S. 584 (1977); Trop v. Dulles, 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349 (1909); O'Neil v. Vermont, 144 U.S. 323 (1892) (dissenting opinion of Fields, J.). The Rummel court clearly admitted that it was bound by these dicta and the implications of the holdings, which it construed as establishing the principle of proportionality in sentencing. In spite of all this, Petitioner alleges that the Rummel court's opinion, "while conceding the validity in theory of both the excessiveness principle and the Coker test, see 587 F.2d at 655, emasculates the principal [sic] by applying the test improperly in practice." (Petition at 7.)

Respondent denies that the court below improperly applied the test, as discussed in Part IV(B) below. Equally important, however, even if it did, no substantial reason for granting the petition is shown. This Court does not sit as a super appeals court to review every alleged improper application of concededly correct legal principles to particular fact situations.

III.

THIS COURT IS PRESENTED WITH NO COMPELLING REASON TO RECONSIDER ITS VERY RECENT REFUSAL TO REVIEW THE IDENTICAL ISSUE PETITIONER SEEKS TO RAISE.

In Carmona v. Ward, ___ U.S. ___, 99 S.Ct. 874 (1979), the Court refused to grant a petition for writ of certiorari to consider "whether two mandatory life sentences imposed under [N.Y. Penal Law §§77.00-2(a), 77.00-3(a) (McKinney)], one for possession of an ounce of a substance containing

cocaine, and the other for sale of 0.00455 of an ounce of a substance containing cocaine, constitute cruel and unusual punishment." Id. at 875 (dissenting opinion of Marshall, J.).

The Second Circuit opinion that the Court refused to review, Carmona v. Ward, 576 F.2d 405 (2d Cir. 1978), is virtually identical in approach, language, and holding to the Fifth Circuit opinion in Rummel. The latter, in fact, relies heavily upon and quotes extensively from the former, especially insofar as the critical issue of the importance of state good time and parole laws is concerned.

In a lengthy and vigorous dissent to the denial of the petition for writ of certiorari in Carmona, Justices Marshall and Powell presented many of the arguments espoused by the Rummel dissenters in the court below and advanced by Petitioner herein. Only four months ago, these arguments failed to persuade the Court. There is simply no perceptible reason for reconsidering that conclusion now.

The only such reason suggested by Petitioner is that his case is better than Carmona's because it does not involve drug offenses, an area imbued with special social interests not present in his crimes, consisting of forgery, credit card abuse, and theft. In fact, special social interests are invoked by Petitioner's life sentence, which was automatically imposed upon his conviction because of his adjudication as a habitual offender under Texas law. Petitioner did not receive his life sentence, that is, merely because he committed three offenses totaling \$230.11 in booty, but because over a long period of time he exhibited a total inability to conform his conduct to the norms of civilized society.

Therefore, the special social interests in implementing his sentence are at least as important as those in upholding Carmona's. There is no significant reason for reaching a different result in Rummel's petition for writ of certiorari than in Carmona's.

THE DECISION BELOW WAS CORRECT.

For three reasons, the en banc court in Petitioner's case correctly denied relief.

A. Petitioner Procedurally Defaulted Any Right To Challenge His Punishment As Cruel And Unusual By Failing To Object To Enhancement Upon That Or Any Other Basis At Trial.

It is uncontested that Petitioner did not object to any aspect of the sentencing proceedings at his trial. He not only made no pre-trial motion to quash the enhancing allegations of his indictment, but plead "True" to them at the punishment stage of his bifurcated trial. He did not object to the introduction of the prior convictions. He did not object to the trial court's instructions to the jury, which compelled a sentence of life imprisonment if the jury found that Petitioner had been twice previously convicted of felonies, and he raised no Eighth Amendment issue in a motion for new trial.

It is further uncontested that Texas generally employs a "correct contemporaneous objection rule" for preservation of grounds of error that might have been raised at trial.

5 TEX.JUR.2d, Appeal & Error--Criminal Cases, §22 at 42-43, Sec. 35 at 56 (1959), and cases there cited; see St. John v. Estelle, 563 F.2d 168 (5th Cir. 1977) (en banc). For these reasons, Respondent urged in the court below that application of the procedural default doctrine of Wainwright v. Sykes, 433 U.S. 72 (1977), precludes consideration of Petitioner's Eighth Amendment claim.

The Rummel court rejected this argument for two reasons, both of which are erroneous. First, the Court held that the Texas Court of Criminal Appeals "has repeatedly rejected Rummel-like challenges to the Texas habitual criminal statute [footnote omitted]" and that Rummel should not have been required to "make a futile gesture at his trial." Rummel at 653. Apart from the fact that nothing in Sykes sanctions

a futility exception to the procedural default doctrine, Petitioner has always insisted that his case is a more compelling one than those previously presented. Certainly nothing in the Texas cases rejecting "Rummel-like challenges" precludes the possibility that the Texas Court of Criminal Appeals might in a proper case find a sentence cruel and unusual solely because of its length, any more than the several previous Fifth Circuit cases rejecting such challenges precluded a Fifth Circuit panel from finding for Rummel.

Second, the en banc Rummel court noted that Texas requires no contemporaneous trial objection by a criminal defendant to challenge later the constitutionality of the statute under which he was convicted. But Petitioner does not challenge the constitutionality of that statute; he recognizes that Spencer v. Texas, 385 U.S. 554 (1967), and many other cases would be adversely dispositive of any such contention. Instead, he contends the statute is unconstitutional as applied to him. Each such challenge obviously rests upon its own facts and is precisely the type of question best raised initially at the trial court and as to which the trial judge should make the initial determination. In short, valid state interests would be served by applying Wainwright v. Sykes to Petitioner's case. Because of this independent barrier to reviewing Petitioner's claim on the merits, the petition for writ of certiorari should be denied.

B. Petitioner's Sentence Of Life Imprisonment Is Not Cruel And Unusual Under The Eighth Amendment.

The majority in the court below rejected Respondent's argument that it was "without power under the eighth amendment to review any prison sentence within the legislatively created maximum," in spite of much conceded authority for

that position. Rummel at 654 & nn. 3,4. The majority concluded, therefore, that "if the court is forced to assume that Rummel's sentence is automatically and invariably one for his natural life," then it is probably grossly disproportionate. Id. at 659.

For that reason, the pivotal basis of decision--and the crux of the entire dispute in the court below--was the proper application of the Texas good time and parole laws. The record contains a detailed compendium of the good time credit provisions and their effect on parole at the time Petitioner was sentenced of all fifty-one American jurisdictions. A portion of that compendium was reproduced as an appendix to the opinion of the court below. Id. at 663-65.

Respondent thereby illustrated the workings of its good time law, Art. 6184-1, V.A.C.S., currently Art. 6181-1, V.A.C.S., which Respondent argues is the most liberal such statute in the United States. In conjunction with Art. 42.12, §15(a), V.A.C.C.P., the Texas parole statute, "[T]he inevitable conclusion is that Rummel can be eligible for parole at the end of twelve calendar years, or considering his trusty status, even earlier." Id. at 659. A comparison to the statutes of other jurisdictions reveals that Petitioner's actual time in prison would not be appreciably longer in Texas than in many other jurisdictions, assuming some modicum of decorous conduct while incarcerated.

Obviously, it is at this point that all of Petitioner's arguments collapse. The actual sentence is not grossly disproportionate to the nature of his many offenses and his adjudication as a habitual criminal. It is not disproportionate to the actual sentence he might have received in other jurisdictions.

The record contains additional evidence to show that Texas prisoners serving life sentences for offenses such as theft and forgery are paroled significantly sooner--approxi-

mately five years sooner--than those serving life sentences for offenses such as rape and murder. Petitioner's argument that his punishment should not be extended by virtue of denial of parole for a "bad attitude" in prison (Petition at 9) mistakenly presumes that a clear conduct record while incarcerated is the only or even necessarily the most important factor in the parole decision process. Other factors enumerated in the 1978 Texas Board of Pardons and Paroles Handbook on Parole, Mandatory Supervision, and Executive Clemency, include the inmate's developmental and criminal history, intellectual and emotional status, age at the time of his first arrest, point incentive program ratings, and time served on the sentence. (Handbook at 23-25.) The record in the instant case reflects a rational coalescing of all such factors in the manner described and therefore demonstrates rationality in the Texas sentencing scheme.

Not surprisingly, Petitioner has vigorously opposed any consideration of these realities, for they are destructive of his position. Although to ignore them is self-imposed judicial myopia, Petitioner suggests incredibly that granting him parole would not significantly lighten his punishment because the threat of additional incarceration for violation of the conditions of parole is itself cruel and unusual. But as the Rummel majority stated, "We cannot understand how a lifetime requirement of good behavior is too much to ask of a habitual criminal." Rummel at 659 n. 19.

The approach espoused by Petitioner focuses in a manifestly unfair manner upon a very small portion of the entire Texas statutory scheme of punishment. That scheme admittedly imposes on Petitioner a sentence facially more severe than that possible in many other jurisdictions and possibly than in all of them. At the same time, however, the Texas statutes operate to reduce the length of the sentence much more than that possible in numerous other jurisdictions, and possibly more so than any of them.

It has never been thought that the Constitution would forbid such a scheme. Wholly apart from the almost impossible prosecutorial and judicial tasks of applying in practice the rule of law contended for by Petitioner, the concomitant "levelling" of all state statutes in such a way as to stifle any difference in approach to a difficult problem with no easy solution, crime in America, is both unwise and destructive of the proper ends of democratic society.

C. Petitioner Has No Basis For Attacking The Prosecutor's Valid Exercise Of Discretion In Indicting Him As A Habitual Offender.

Petitioner has correctly noted the mandatory nature of the life sentence he received after the prosecutor alleged and proved the requisite prior convictions. The Texas prosecutor is vested with much discretion in the charging process as in many other areas. A holding that Petitioner's sentence is constitutionally impermissible would necessitate holding that the prosecutor abused his discretion in the charging process.

Common sense dictates that a state prosecutor must assess a constellation of factors in setting priorities and goals in the types of crimes he desires to prosecute and the appropriate penalties he will seek under various circumstances. Respondent doubts that the Court believes that the lower federal courts should be in the business of overseeing the daily exercise of prosecutorial discretion in the absence of any suggestion of vindictive or otherwise improper motives.

Such a holding would be contrary to the prior teachings of the Court in such cases as Santobello v. New York, 404 U.S. 257 (1971), and Bordenkircher v. Hayes, 434 U.S. 357 (1978). Endowing federal district courts with the authority to strike down state criminal penalties as excessive on an ad hoc basis would, in light of the complexity of the Texas Penal Code, create a horde of obvious problems for both Texas prosecutors and the lower federal courts. For that

reason, Judge Thornberry, dissenting from the panel opinion in the court below, wrote "Whatever sociological analysis I might apply to this case, I cannot avoid the conclusion that with this decision we stand on the brink of the 'slippery slope' in its most classic sense". Rummel v. Estelle, supra, 568 F.2d at 1202.

If, however, Respondent is wrong on this point, then he suggests that at the very least he is entitled to demonstrate all factors bearing upon the original prosecutorial decision, particularly the full extent of Petitioner's entire criminal history. It would be more than a little unfair, in fact, to deprive Respondent of the opportunity to show Petitioner's other crimes to demonstrate the reasonableness of the prosecutor's decision to seek enhancement merely because Texas law does not require such other crimes to be alleged or proved at trial.

The court below noted, "The record in this case reveals that Rummel was convicted of a fourth felony on the same day he was sentenced under Texas habitual offender statute." Rummel at 659. The record also contains an appendix to an amicus brief filed by the district attorney in Bexar County, Texas, where Petitioner received his life sentence. That appendix contains certified copies of Petitioner's other judgments of conviction for numerous additional crimes over a fourteen-year period, including at least one felony involving the potential for violence (burglary), and two misdemeanors involving both the potential for violence (unlawfully carrying a deadly weapon) and violence itself (aggravated assault on a female).

Therefore, if the Court is dissatisfied that the record in its present state authorizes the punishment imposed, Respondent prays for a remand to the district court where he believes he is entitled to submit additional evidence in support of the valid exercise of prosecutorial discretion in Petitioner's case.

CONCLUSION

For these reasons, the petition for writ of certiorari
should be denied.

Respectfully submitted,

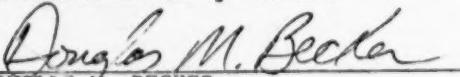
MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

TED L. HARTLEY
Executive Assistant Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

GILBERT PENA
Assistant Attorney General


DOUGLAS M. BECKER
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT

//

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. 78-6386

WILLIAM JAMES RUMMEL, Petitioner

v.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS, Respondent

* * *

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

PETITIONER'S REPLY MEMORANDUM

* * *

Scott J. Atlas
VINSON & ELKINS
2100 First City National
Bank Building
Houston, Texas 77002

Counsel for Petitioner

Of Counsel:

Charles Alan Wright
2500 Red River
Austin, Texas 78705

May 10, 1979

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REPLY

I.

PETITIONER HAS NOT PROCEDURALLY DEFAULTED THE
RIGHT TO CHALLENGE HIS PUNISHMENT AS CRUEL
AND UNUSUAL BY FAILING TO OBJECT ON THAT
BASIS AT THE PUNISHMENT PHASE OF HIS TRIAL.

For the first time in this habeas proceeding,^{1/} Respondent argued in the court below, Second Supplemental Brief of Respondent-Appellee at 36-40, Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978) (en banc), and again in this Court, Brief in Opposition of Respondent, Rummel v. Estelle, No. 78-6386, at 8-9 (filed Mar. 19, 1979) (hereinafter cited as "Respondent's Brief"), that the combination of the federal "procedural default doctrine" and the Texas "correct contemporaneous objection rule" bars Rummel from objecting to his punishment as unconstitutionally cruel and unusual because he failed to object to his sentence during the punishment stage of his trial. But this argument must fail because (1) Respondent waived it by not raising it below and (2) Texas law permits a constitutional objection of this nature to be made at any time.

A. Respondent Waived Its Right to Argue Procedural Default by Not Raising the Argument in the Lower Court.

Rule 8(c) of the Federal Rules of Civil Procedure^{2/} requires that all affirmative defenses be alleged in responsive trial pleadings: "In pleading to a preceding pleading,

^{1/} Respondent did not raise this issue in proceedings in either the state courts, the federal district court, or the Fifth Circuit panel.

^{2/} It appears that the civil procedural rules apply in habeas corpus proceedings. Fed. R. App. P. 8(a)(2) ("these rules are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions").

a party shall set forth affirmatively . . . waiver, and any other matter constituting an avoidance or affirmative defense." Fed.R.Civ.P. 8(c) (emphasis added). A failure to plead an affirmative defense waives it, see, e.g. Funding Systems Leasing Corp. v. Pugh, 530 F.2d 91, 96 (5th Cir. 1976); Phoenix Assurance Co. v. Appleton City, 296 F.2d 787, 792 (8th Cir. 1961), and it cannot be raised for the first time on appeal, e.g., Atlas Assurance Co. v. Standard Brick & Tile Corp., 264 F.2d 440, 443 (7th Cir. 1959). Having failed to raise the procedural default issue below, Respondent cannot raise it now.

B. The Texas Contemporaneous-Objection Rule Does Not Apply to Petitioner's Objection to His Sentence.

In support of its position that Rummel waived his right to object to the life sentence by failing to object at trial, Respondent cites 5 Tex. Jr. 2d, Appeal and Error--Criminal Cases § 22, at 42-43 (1959), cited in Respondent's Brief at 8, but fails to cite the next section, id. § 23, which provides that failure to raise a fundamental error at trial does not preclude raising it on appeal. According to this authority, among such fundamental errors that can be raised at any time is "an objection that the statute under which the defendant was convicted is violative of the constitution," id. at 44 (citing Barnes v. State, 170 S.W. 548, 550 (Tex. Crim. App. 1914), cited approvingly in Gann v. Keith, 253 S.W.2d 413, 417 (Tex. 1952), as the court below recognized, 587 F.2d at 653-54).

Even if it did apply, the two grounds justifying an exception to the procedural default doctrine recognized in Francis v. Henderson, 425 U.S. 536, 542 (1976); accord, Wainwright v. Sykes, 433 U.S. 72, 90-91 (1976) -- "good cause" and "actual prejudice" -- would protect Rummel. "Good cause"

is present if the defendant can show that no reasonable person would have freely elected not to object.^{3/} Surely no one can dispute that Rummel had no reasonable expectation of prevailing in state court on his Eighth Amendment claim, given the long line of Texas cases upholding the habitual provision from Eighth Amendment attack, as pointed out by the court below, 587 F.2d at 653 n.2, and further confirmed in the summary rejection by the Texas Court of Criminal Appeals of Rummel's application for habeas corpus relief on the same issue. Moreover, Rummel obviously had no tactical reason for withholding his objection, since (1) he did not raise the issue in his direct appeal and (2) he would have received no greater relief from a successful appeal than from a successful trial court ruling.

"Actual prejudice" is likewise easily demonstrated, since Rummel has and will continue to serve a significantly longer sentence than he would have if the trial judge had ruled the sentence excessive.

II.

HART AND RUMMEL CANNOT BE RECONCILED

Respondent argues that the contradictory results reached by the Fourth and Fifth Circuits on almost identical facts, compare Rummel (en banc) with Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied as untimely filed, 415 U.S. 938 (1974), is better explained by different fact situations than by different legal tests and cites six post-Hart Fourth

^{3/} According to one authority, "a defendant may avoid [procedural default] by showing not only that he did not 'waive' the right by free and intelligent choice but also that no reasonable person would, under the circumstances, have done so." Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis, 55 Texas L. Rev. 193, 211 (1977).

Circuit cases that allegedly "show a consistent refusal to apply Hart in a variety of contexts." Respondent's Brief at 5.

But the implication that Hart (perjury, forgery, and bad check) involved offenses less serious than Rummel's (credit card abuse, forgery, and theft by false pretext^{4/}) is patently preposterous. And in each of the cited cases, either the sentence was much less than life and had been assessed by judge or jury rather than imposed by statute or the offenses involved potential violence and danger to life and property,^{5/} so that the Hart tests were not fulfilled.

III. THE PROSECUTOR'S DISCRETION TO INDICT HABITUAL OFFENDERS IS NOT AN ISSUE IN THIS CASE

Respondent claims that a holding that Rummel's sentence is unconstitutionally excessive requires holding that the prosecutor abused his discretion in the charging process, Respondent's Brief at 12, and that Respondent should be given the opportunity to demonstrate all factors bearing on the

^{4/} Rummel took a check and promised in return to fix an air conditioner. He was convicted for intending not to fulfill the promise when he made it.

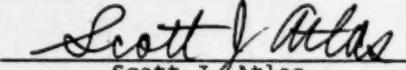
^{5/} See Davis v. Davis, 585 F.2d 1226, 1228 (4th Cir. 1978) (jury assessed 40 year sentence for marijuana dealer); United States v. Williamson, 567 F.2d 610, 616 (4th Cir. 1977) (judge assessed eight years for felon possessing firearms); Robert v. Collins, 544 F.2d 168, 169 (4th Cir. 1976) (per curiam) (judge assessed 20 years, reduced to 15, for person pleading guilty to simple assault after being charged with assault with intent to murder two policemen); Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975), cert. denied, 96 S.Ct. 1733 (1976) (parole board revoked parole, requiring forgerer to serve 7-year sentence); Griffin v. Warden, 517 F.2d 756, 757 (4th Cir. 1975) (statute mandated life sentence for grand larceny, breaking and entering, and burglary of a home); Wood v. South Carolina, 483 F.2d 149, 150 & n.2 (4th Cir. 1973) (per curiam) (judge assessed 5 years for obscene telephone caller who had prior convictions for burglary, larceny, and auto theft).

prosecutor's original decision, *id.* at 13. But Rummel challenges the Texas Legislature's right to confer the power to indict a three-time petty property offender under the habitual offender statute, not the prosecutor's decision to exercise that power. Moreover, the factors upon which Respondent requests an opportunity to justify the prosecutor's exercise of discretion are matters that were not a part of the original record but were first raised in an eleventh-hour amicus curiae brief filed shortly before oral argument in the Fifth Circuit en banc. Respondent's attempt to shift the issue from legislative power to prosecutorial discretion and to rely on matters outside the record exposes the weakness of Respondent's position.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



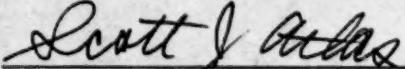
Scott J. Atlas

VINSON & ELKINS
2100 First City National
Bank Building
Houston, Texas 77002
(713) 651-2024

Counsel for Petitioner

CERTIFICATE

I, Scott J. Atlas, do hereby certify that a true and correct copy of the above and foregoing Reply Memorandum has been served by placing same in the United States mail, postage prepaid, certified, on this the 11th day of May, 1979, addressed to Mark White, Attorney General, and Gilbert Pena and Douglas M. Becker, Assistant Attorneys General, all at P.O. Box 12548, Capitol Station, Austin, Texas 78711.



Scott J. Atlas

Supreme Court, U.S.
FILED

AUG 8 1979

MICHAEL KROAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-6386

WILLIAM JAMES RUMMEL,

Petitioner,

v.

W.J. ESTELLE JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

SCOTT J. ATLAS
VINSON & ELKINS
2100 First City National Bank
Building
Houston, Texas 77002

*Court-appointed Counsel for
Petitioner*

Of Counsel

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-6386

WILLIAM JAMES RUMMEL

Petitioner,

v.

W. J. ESTELLE DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT**

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The en banc opinion of the court of appeals (A. 25)¹ is reported at 587 F.2d 651. The panel opinion of the

¹ Throughout this Brief, references to the record on appeal will be made as follows: "(R. ____)." References to the separately bound Appendix will be made as follows: "(A. ____)." References to the separately bound charts submitted with this Brief, which contain only data of which this Court can take judicial notice, will be made as follows: "(C. ____)."

court of appeals (A. 9) is reported at 568 F.2d 1193. The opinion of the district court (A. 4) is not reported.

JURISDICTION

The judgment of the en banc court of appeals was entered on December 20, 1978 (A. 56). A petition for rehearing was denied on March 9, 1979 (A. 55). A petition for a writ of certiorari was filed on March 19, 1979, within 90 days of both dates, and was granted on May 21, 1979 (A. 57). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Texas habitual offender statute, which mandates a life sentence upon conviction of a felony with two prior felony convictions, constitutes cruel and unusual punishment when applied to Rummel's conviction for theft by false pretext of \$120.75, with prior convictions for presenting a credit card with intent to defraud of property worth approximately \$80.00 and passing a forged check with a face amount of \$28.36.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides as follows:

Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

Article 12.42(d) of the Texas Penal Code of 1974 provides:

If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life.

Article 63 of the Texas Penal Code of 1925, the predecessor statute to article 12.42(d), provides:

Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.

Article 979 of the Texas Penal Code of 1925 provides:

He is guilty of forgery who without lawful authority, and with intent to injure or defraud, shall make a false instrument in writing purporting to be the act of another, in such manner that the false instrument so made would (if the same were true) have created, increased, diminished, discharged or defeated any pecuniary obligation, or would have transferred, or in any manner have affected any property whatever.

Article 996 of the Texas Penal Code of 1925 provides:

If any person shall knowingly pass as true, or attempt to pass as true, any such forged instru-

ment in writing as is mentioned and defined in the preceding articles of this chapter, he shall be confined in the penitentiary not less than two nor more than five years.

Article 1410 of the Texas Penal Code of 1925 provides:

"Theft" is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking.

Article 1413 of the Texas Penal Code of 1925 provides:

The taking must be wrongful, so that if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation of it is not theft, but if the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete.

Article 1555b, section 1 of the Texas Penal Code of 1925 provides:

It shall be unlawful for any person to present a credit card or alleged credit card, with the intent to defraud, to obtain or attempt to obtain any item of value or service of any type; or to present

such credit card or alleged credit card, with the intent to defraud, to pay for items of value or services rendered.

STATEMENT OF THE CASE

The background proceedings, as stated in the Fifth Circuit panel opinion and quoted in the en banc opinion, are as follows:

In January 1973, a Texas grand jury indicted Rummel for the felony offense of obtaining \$120.75 under false pretenses [(R. 79-80) in violation of articles 1410 and 1413 of the Texas Penal Code of 1925].² The indictment also

² On August 15, 1972, the complaining witness, David Lee Shaw, gave Rummel a check for \$120.75 in return for Rummel's promise to repair or replace a defective air conditioning compressor (R. 140-43, 158, 163-66, 176-78; see R. 152, 171, 206, 249-50). Although Rummel apparently attempted unsuccessfully to both purchase a new compressor (R. 146, 154, 169, 175) and retrieve the air conditioner (R. 171-73), he never performed the repairs (R. 146, 150-51, 168-69) after cashing the check (see R. 180-81, 191). The jury was asked to determine whether Rummel had intended to repair the air conditioner when he accepted Shaw's check (R. 107-09).

Rummel's attorney attempted unsuccessfully (R. 214-15; see R. 132-34) to introduce a signed and notarized statement indicating that Shaw had agreed to release Rummel from any claims concerning the \$120.75 check and that Shaw "ha[d] no knowledge of any facts upon which any criminal prosecution could be based" (R. 214-16, 280). Shaw testified that a few days before trial, Rummel's parents had contacted Shaw and paid him \$50.00 in return for Shaw's agreement to drop charges (R. 158-59).

charged him with having two prior felony convictions [(R.81)]: In 1964 he presented a credit card with the intent to defraud of approximately \$100, and in 1969 he passed a forged instrument with a face value of \$28.36. [A] jury found him guilty as charged [of the false pretenses offense (R. 113, 281)]. After the state proved his two prior convictions [(R. 226-37, 255-78)], Rummel received an enhanced sentence of life imprisonment [(R. 244, 288)] under the Texas habitual criminal statute then applicable, Tex. Penal Code Ann. art. 63 (Vernon 1925). On appeal, the Texas Court of Criminal Appeals affirmed his conviction. *Rummel v. State*, 509 S.W.2d 630 (Tex. Crim. App. 1974). Rummel applied for postconviction relief and raised in the Texas courts the [issue presented here and an ineffective counsel claim (R. 36-40)], but his application was denied [by both the district court (R. 51-54) and the Texas Court of Criminal Appeals (R. 31)] without a hearing [(R. 53)]. Then Rummel sought habeas corpus relief [on the same grounds] in the federal district court [(R. 3-9)], which also denied his petition [(A. 4-6; R. 328-31)] without a hearing [(A.6; R. 331)].

Rummel v. Estelle, 568 F.2d 1193, 1195 (5th Cir.1978) (panel opinion) (A. 10), quoted in *Rummel v. Estelle*, 587 F.2d 651, 653 (5th Cir. 1978) (en banc) (A. 26). By a 2-1 vote, a Fifth Circuit panel reversed the district court decision and held that article 63's automatic life sentence was cruel and unusual as applied to the offenses for which the sentence had been assessed. 568 F.2d 1193 (A. 9) (hereinafter referred to as "the panel opinion").

By an 8-6 vote, the Fifth Circuit sitting en banc vacated the panel opinion, affirmed the district court's denial of the petition on the Eighth Amendment issue, and remanded the case to the panel for reconsideration of the Sixth Amendment issue.³ 587 F.2d 651 (A. 25) (hereinafter referred to as "the en banc opinion"). The en banc court held, in short, that while a severe sentence imposed for a minor offense could be cruel and unusual solely because of its length, 587 F.2d at 655 (A. 30), Rummel's automatic life sentence does not violate the Eighth Amendment because Rummel failed to prove that the legislative scheme has no rational basis and is totally and utterly rejected in modern thought, *id.* at 655-56, 661-62 (A. 30-31, 40-41). The en banc court reasoned as follows: (1) under Texas' good time credit system, Rummel becomes eligible for parole in twenty years, or in twelve years if he behaves while in prison, *id.* at 657-59 (A. 33-35); (2) the nature of the three offenses triggering Rummel's mandatory life sentence under article 63 is irrelevant, because the purpose of article 63 is to punish all three-time felons, irrespective of the nature of their underlying offenses, *id.* at 659 (A. 36); (3) Rummel might have received a comparable sentence in

³ On remand, the panel reversed the district court decision on the Sixth Amendment issue and remanded the case to the district court for an evidentiary hearing on that issue. *Rummel v. Estelle*, 590 F.2d 103 (5th Cir. 1979). No hearing has yet been held. The second panel decision raises no issues presented to the Court in the Petition for Certiorari or in this Brief.

several other jurisdictions, *id.* at 659-60 (A. 37-38); (4) Rummel's punishment cannot appropriately be compared to the penalty for any single offense in Texas, *id.* at 660 (A. 38-39); and (5) the test of "whether a significantly less severe punishment could achieve the purposes for which the challenged punishment is inflicted," *id.* at 660-61 (A. 39) (emphasis in original) (quoting the panel opinion, 568 F.2d at 1198 (A. 16)), has no role in Eighth Amendment analysis.

SUMMARY OF ARGUMENT

A. Application of the Eighth Amendment to Lengthy Sentences

In *Weems v. United States*, 217 U.S. 349 (1910), the Court held cruel and unusual a fine and 12-year sentence at *cadena temporal* (hard labor with chains) for falsifying a public record. While the decision rested in part on the inherent cruelty of *cadena temporal*, it also relied separately on the principle that the Eighth Amendment requires sentence length to be proportioned to the offense. Although *Weems* is the only case in which the Court has ever invalidated as cruel and unusual an excessively long prison term, frequent references to *Weems* in recent cases attest to the continuing vitality of the *Weems* principle as a limit on sentence length for relatively minor offenses.

B. The *Coker* Excessiveness Tests

Recently, the Court in *Coker v. Georgia*, 433 U.S. 58 (1977), indicated that a punishment exceeds the limits

of the Eighth Amendment if it "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain or suffering; or (2) is grossly out of proportion to the severity of the crime." *Id.* at 592. Holding capital punishment for rape invalid on the second ground, the Court focused on three indices of disproportionality: (1) the nature of the offense, (2) the punishment for the same crime in other jurisdictions, and (3) the penalty for comparable offenses in the same jurisdiction.

1. Disproportionality

Rummel's punishment easily qualifies as excessive under all three criteria employed in the *Coker* Court's application of the "gross disproportionality" test.

a. Nature of the Offenses

First, Rummel's three offenses—forging a check with a face amount of \$28.36, using another person's credit card to purchase approximately \$80.00 in merchandise, and taking a check for \$120.75 in return for a false promise to repair an air conditioner—lack the elements of violence, threat of harm, skill in crime, or moral depravity necessary to justify a life sentence.

The en banc court could justify its result only by first exaggerating the seriousness of Rummel's offenses and then trivializing the length of his life sentence. First, the court refused to consider the nature of Rummel's offenses and focused solely on the number of

Rummel's offenses as they reflect his supposed inability to conform to societal norms. In this manner the court precluded all challenges to sentences for repeat offenders, no matter how trivial the offenses.

Second, the en banc court treated Rummel's punishment as equivalent to a 12-year sentence because he could become eligible for parole consideration at the end of that period by obtaining the maximum good time credit during his term. Such logic overlooks several factors. First, Texas officials grant parole sparingly. Second, the possibility of parole creates no due process right to release, only "a mere hope." Reliance on bare possibilities deprives Rummel of his only opportunity for judicial review of his sentence and delegates the judiciary's responsibility for the Eighth Amendment proportionality inquiry to parole authorities, who rely on criteria unrelated to the nature of the offenses. Third, "bad" but not illegal behavior in prison, which is punishable by a loss of good time credit and a reduction in parole probabilities, surely would not justify an otherwise indefensibly excessive sentence. Finally, lifetime parole is not complete freedom; it is accompanied by lifetime supervision and the threat of reincarceration for even minor, noncriminal parole violations.

b. Punishment for the Same Offenses in Other Jurisdictions

Measured by the second criterion highlighted in *Coker*—punishment for the same offense in other ju-

risdictions—Rummel's sentence stands out as even more grossly excessive. Except for one state whose highest court has indicated serious Eighth Amendment reservations about application of a recidivist law to petty offenders, the law in no other American jurisdiction mandates a life sentence upon conviction of any three felonies. While statutes in three other states impose a life sentence after a fourth felony conviction, every other state law requires commission of at least one violent crime, imposes a sentence less than life, or grants sentencing discretion. Moreover, the Texas law, first enacted in 1856, once shared company with mandatory life sentence statutes in other states but now stands alone in the face of a marked national trend toward lighter and discretionary sentences and a violent crime limitation.

c. Punishments for Similar Offenses in Texas

The final *Coker* proportionality criterion—the penalty for similar offenses in the forum jurisdiction—underscores the severity of Rummel's sentence. Except for capital murder, Texas law does not impose a life sentence on even the most violent or depraved single or two-time offender. Moreover, Rummel's third offense became a misdemeanor eight months after his trial, carrying a maximum sentence of only one year.

2. No Measurable Contribution to Acceptable Penal Goals

Although the Court has never defined the contours of the *Coker* "no measurable contribution" test, Rummel's sentence probably qualifies since the enhanced punishment mandated by the Texas recidivist statute contributes almost nothing to the four recognized legitimate penological objectives: isolation, deterrence, rehabilitation, and retribution.

First, isolation of a repeat offender is an acceptable objective only to the degree that the offender endangers the public safety or welfare. But the true threat to the social order—the professional, dangerous criminal—often escapes detection or conviction and receives a long sentence upon first conviction. Meanwhile, most petty thieves, who are a nuisance but not a threat, have lost their propensity for criminal conduct by the time they are apprehended and convicted as habitual offenders.

Second, deterrence is a realistic expectation only when the punishment is proportioned to the gravity of the crime. And dangerous criminals anticipate heavy sentences upon apprehension, irrespective of enhancement statutes.

Third, long-term imprisonment, even if ultimately combined with permanent parole, does not rehabilitate. Instead, it psychologically destroys the recipient of the punishment.

Finally, retribution is a legitimate penal objective, if ever, only when the punishment fits the crime.

Indiscriminately harsh enhancement statutes such as the Texas law advance no coherent policies because judges sympathetic to the accused's plight encumber such statutes with restrictive prerequisites, prosecutors plea bargain based on criteria unrelated to any penal purpose, and juries, when given the opportunity, refuse to convict if the sentence is disproportionately severe.

3. Mandatory Nature of the Texas Law

If a judge or jury had independently assessed Rummel's life sentence, his objections would lose their force. Rummel's jury had no opportunity to nullify the prosecutor's case or consider mitigating circumstances, however, because Texas law prohibits informing the jury about the punishment automatically assessed a third offender once the factfinder determines that the defendant had been convicted of the two previous felonies alleged in the indictment.

4. Subjectivity

The en banc court objected to Rummel's analysis as subjective and predicted a flood of litigation. Although application of the Eighth Amendment, as with many constitutional rights, is inherently subjective, the proportionality principle is sufficiently important to sacrifice some objectivity. Moreover, the three cri-

teria used in *Coker* minimize subjectivity. Lower state courts have employed similar tests for years without being deluged by litigation. And the difficulty of developing objective measures argues for renewed effort to fashion such criteria, not for surrender.

C. Rational Basis

The rational basis test interjected by the en banc court is useless as a measure of punishment excessiveness since even torture has some rational basis as retribution or deterrent. While courts properly defer to legislative judgments, this Court has never imposed a rational basis standard in its Eighth Amendment proportionality decisions.

D. Procedural Default

By not raising the issue until after the original panel decision, the State waived its right to argue that Rummel waived his Eighth Amendment objection by failing to raise it during the punishment stage of his trial. Moreover, the State misconstrues the Texas rule that objections must be made contemporaneous with the first appearance of the objectionable practice. The rule does not apply to an inadvertent or futile failure to object, since the rule derives from Texas courts' efforts to prevent an accused from deliberately foregoing objection at trial to correctible matters in order to preserve ammunition for an appeal if the trial concludes unsuccessfully. Moreover, Rummel can meet

the "good cause" and "actual prejudice" exceptions to the procedural default doctrine. He had good cause to believe that the state trial court would reject an Eighth Amendment challenge to the state habitual offender statute. And he has suffered actual prejudice by serving a much longer sentence than would have occurred if he had prevailed at trial on the Eighth Amendment issue.

E. Prosecutorial Discretion

The State's argument that a decision favoring Rummel's position requires finding an abuse of prosecutorial discretion is superfluous. Rummel challenges the legislature's right to authorize the prosecutor to indict a three-time petty offender under the recidivist statute, not the prosecutor's decision to exercise that power.

F. Rummel's Right to Immediate Release

Since Rummel requested jury sentencing at trial and Texas law gives such a defendant the right to be sentenced by the same jury that convicted him, reversal of his sentence would entitle Rummel to a new trial. Since he would then exercise his right to be tried and sentenced under the 1974 Texas Penal Code, which reduces his third offense to a misdemeanor punishable by a maximum term of one year, Rummel could not be retried because he has served longer than the maximum possible sentence.

ARGUMENT

THE IMPOSITION OF A MANDATORY LIFE SENTENCE PURSUANT TO THE TEXAS RECIDIVIST STATUTE IS SO DISPROPORTIONATE TO THE UNDERLYING OFFENSES FOR WHICH RUMMEL WAS CONVICTED THAT IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Article 63 of the old Texas Penal Code mandates a life sentence for anyone convicted of three noncapital felonies. Tex. Penal Code Ann. art. 63 (1925).⁴ Rummel contends that the Texas recidivist statute's mandatory life sentence as applied to him is so disproportionate to the seriousness of the three offenses underlying his three felony convictions that it constitutes cruel and unusual punishment forbidden by the Eighth Amendment.⁵

A. The Eighth Amendment Limits Excessively Long Sentences.

Recidivist and enhancement statutes such as the Texas law challenged here are apparently not uncon-

⁴ The 1974 Penal Code preserved article 63, with minor variation, in section 12.42(d). Tex. Penal Code Ann. § 12.42(d) (1974).

⁵ It is well settled that the Eighth Amendment applies in full force to the states through the Fourteenth Amendment. Furman v. Georgia, 408 U.S. 238, 257-58 n.1 (1972) (Brennan, J., concurring) (citing Robinson v. California, 370 U.S. 660 (1962)); *id.* at 328 n.34 (Marshall, J., concurring)(same).

stitutional *per se* under the Eighth Amendment.⁶ But such statutes, as with any statute, are not insulated

⁶ See *Spencer v. Texas*, 385 U.S. 554, 560 (1967) (citing cases). The case most frequently cited as precedent for the proposition that habitual offender statutes are not cruel and unusual *per se*, *Moore v. Missouri*, 159 U.S. 673 (1895) (life sentence for burglary of a home with prior conviction for grand larceny, based on statute mandating maximum sentence upon conviction of second offense punishable by imprisonment), barely touched on the issue as an after-thought to an analysis of a Double Jeopardy claim. The Court made the point that an extended punishment is given not for the earlier crime but rather for the immediate offense as aggravated by the earlier conviction. *See id.* at 677. The Court also relied on *In re Kemmler*, 136 U.S. 436 (1890) (challenging penalty of death by electrocution, imposed for first-degree murder), which turned on the since-discredited assumption, *see* text accompanying notes 9-11 *infra*; compare *Robinson*, 370 U.S. 660, that punishments are cruel only when they involve torture and lingering death, *see* *Kemmler*, 136 U.S. at 446-47.

In *McDonald v. Massachusetts*, 180 U.S. 311 (1901) (25 years for forgery with prior convictions for perjury and theft imposed by statute mandating 25-year sentence upon conviction of any crime and a finding of prior convictions for any two offenses for which prison terms of at least 3-years each had been served), the Court summarily dismissed an Eighth Amendment claim, relying on the same points made in *Moore*.

Subsequent cases merely assumed that *McDonald* and *Moore* settled the issue. *See, e.g.*, *Oyler v. Boles*, 368 U.S. 448, 451 (1962) (*dicta*)(life sentence for 2 petitioners convicted of the following sets of offenses: (1) murder with prior convictions for grand larceny, breaking and entering, and burglary, *see* Brief for Petitioners at 4-6, *Oyler v. Boles*, 368 U.S. 448 (1962); and (2) forgery with prior convictions for forgery and forgery in the first degree,

from challenge as applied in a particular case. If the Texas statute is applied to inflict punishment suffi-

see id. at 7-8, under a statute mandating a life sentence upon third conviction of any offense punishable by imprisonment; Eighth Amendment issue not raised); *Graham v. West Virginia*, 224 U.S. 616, 631 (1912) (life sentence for grand larceny with prior convictions for burglary and grand larceny under same statute as that involved in *Oyler*). The Court made the same assumption in discussing article 63 in *Spencer*. 385 U.S. at 560 (dicta) (life sentence under the Texas statute for 3 petitioners convicted of the following sets of offenses: (1) 2 murders with malice, (2) robbery by assault and robbery, and (3) burglary with prior convictions for burglary and theft, *see Record* at 36-37, *Reed v. Beto*, consolidated with *Spencer v. Texas*, 385 U.S. 554 (1967); Eighth Amendment issue not raised) (citing *McDonald*, *Oyler*, and a case, *Howard v. Fleming*, 191 U.S. 126 (1903), in which the Court examined a 10-year sentence for swindling and conspiring to defraud in light of the nature of the offenses and concluded that the sentence did not violate the Eighth Amendment, *id.* at 136).

For criticism of the summary treatment of this issue in *Spencer* and the cases on which it relies, see Katkin, *Habitual Offender Laws: A Reconsideration*, 21 Buffalo L. Rev. 99, 113-15 (1971). See also *Goss v. Bomar*, 337 F.2d 341, 342-43 (6th Cir. 1964).

Moore and *Spencer* may be the final word on *per se* Eighth Amendment attacks, which is unfortunate since the primary rationale of those cases—*i.e.*, that a State can increase punishment for the most recent offense as aggravated by the prior offenses—ignores the indiscriminately mandatory nature of the increased sentence. Cf. G. Fletcher, *Rethinking Criminal Law* §6.6.2, at 459-66 (1978) (criticizing such reasoning as inappropriate for a democracy). But those cases dealt only with general application of such statutes in cases brought by defendants who either had

ciently excessive and disproportionate to the underlying offenses,⁷ such an application cannot stand.⁸

not raised the issue, had been convicted of potentially violent or heinous crimes, or in one instance, *McDonald*, had been punished by a term much shorter than life imprisonment. None of those cases discussed—indeed, probably none of the prisoners in those cases except *Oyler* even had standing to raise—the issue raised here, *i.e.*, whether a facially valid recidivist statute that mandates imposition of a life sentence can be unconstitutionally cruel when applied to a person convicted of three petty property offenses.

⁷ See *Furman*, 408 U.S. at 242 (Douglas, J., concurring); compare *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (Stewart, Powell & Stevens, JJ., plurality opinion) (citing *Weems v. United States*, 217 U.S. 349, 367 (1910)):

When a form of punishment in the abstract (in this case, whether capital punishment may ever be imposed as a sanction for murder) rather than in the particular (the propriety of death as a penalty to be applied to a specific defendant for a specific crime) is under consideration, the inquiry into "excessiveness" has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. . . . Second, the punishment must not be grossly out of proportion to the severity of the crime.

The issue whether an otherwise valid punishment can be unconstitutionally applied when, *inter alia*, there is no actual or potential danger of violence or personal injury requires an as-applied challenge. Compare *Coker v. Georgia*, 433 U.S. 584 (1977) (holding death penalty for rape unconstitutionally excessive, at least when rapist does not take victim's life), with *id.* at 601 (Powell, J., dissenting) (indicating that declaring punishment unconstitutionally cruel as applied to rapes committed with brutality or causing serious injury would require case-by-case examination of circumstances surrounding the offense), and *Packer, Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1077

Weems v. United States, 217 U.S. 349 (1910) (fine and 12 years at *cadena temporal*, i.e., hard labor with
 (1964) (issue whether rapist who has not threatened human life can be executed requires inquiry into justification of penalty in each case rather than legislative decision to permit use of death penalty in general, and thus indeterminate, class of cases, which is an "as applied" rather than a *per se* approach).

*The concept of proportionality between crime and punishment has considerable historical support. It was one of the earliest principles systematically employed to limit punishment in Western civilization. See *Carmona v. Ward*, 576 F.2d 405, 425 & n.1 (2d Cir. 1978), cert. denied, ____ U.S. ___, 99 S. Ct. 874 (1979) (dissenting opinion); Granucci, "Nor Cruel and Unusual Punishments Inflicted: The Original Meaning," 57 Cal. L. Rev. 839, 844-45 (1969). The English source documents from which the American Framers drew the Eighth Amendment reflect the English common law principle that prohibited disproportionate punishment. *Carmona*, 576 F.2d at 425-26 (dissenting opinion); Granucci, *supra*, 57 Cal. L. Rev. at 845-47, 860. See generally *id.* at 848-59; *Gregg*, 428 U.S. at 153 (plurality opinion). This concept has survived in England to this day. See Brief for Petitioner at 31-32 n.24, *Coker v. Georgia*, 433 U.S. 584 (1977) (quoting H. Hart, *Punishment and Responsibility* 80 (1968): "we . . . maintain a scale [of punishments] for different offenses which reflects, albeit very roughly, the distinctions felt between the moral gravity of these offenses").

The intent of the American Framers is unclear, since they adopted the Eighth Amendment with little discussion. *Furman*, 408 U.S. at 244 (Douglas, J., concurring); *Weems*, 217 U.S. at 368-69; Granucci, *supra*, 57 Cal. L. Rev. at 842. While it is generally accepted that the Eighth Amendment was directed primarily against torture and barbarous methods of punishment, more recent research suggests that the Framers may have included the concept of proportionality in their understanding of the meaning

chains, plus lifetime restrictions for falsifying a public record), is the only case in which this Court has ever applied the Eighth Amendment to invalidate an excessively long prison term.⁹ Although the Court has

of the Eighth Amendment. See *Weems*, 217 U.S. at 372 ("[S]urely, [the Framers jealousy of power had a saner justification than [a fear of abuses no longer practiced]]"; *Carmona*, 576 F.2d at 405 (dissenting opinion); I. Brandt, *The Bill of Rights* 464 (1951) ("Beccaria['s] essay *On Crimes and Punishments* [with its emphasis on proportionality between crime and punishment] helped shape our Fifth and Eighth Amendments"). See also *Ullman v. United States*, 350 U.S. 422, 450 (1956) (Douglas, J., dissenting) (Beccaria and his followers influenced American thought in the years following 1776); Wheeler, *Toward a Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia*, 25 Stan. L. Rev. 62, 63-64 n.7 (1972); Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 Buffalo L. Rev. 783, 806-30 (1975) (the Framers were influenced by the writings of many Enlightenment philosophers, including Beccaria, Montesquieu, and Voltaire, who argued based on Rousseau's social contract theory for the principle of proportional punishment). At the very least, scholars have concluded that the Framers intended for the word "cruel" to embody the moral concept of cruelty, in the expectation that the dimensions of that concept would evolve over time. Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. Pa. L. Rev. 989, 1031-33 (1978); see *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁹ Although the *Weems* Court based its decision in part on the inherent cruelty of the punishment, it also relied on the separate grounds that the Eighth Amendment prohibits excessively cruel punishment as well as inherently cruel forms of punishment and

not held a sentence unconstitutionally disproportionate that the length of punishment must be proportioned to the offense. *Gregg*, 428 U.S. at 171-72 (Stewart, Powell & Stevens, JJ., plurality opinion); see *Weems*, 217 U.S. at 367-68, 371-73, 377; accord, *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Furman*, 408 U.S. at 325 (Marshall, J., concurring); compare *Weems*, 217 U.S. at 411 (dissenting opinion) (characterizing the majority opinion as holding that "because of the mere term of imprisonment . . . [the sentence can be reviewed for an abuse of legislative discretion]"). See also *Ingraham v. Wright*, 430 U.S. 651, 667 (1977).

The *Weems* opinion relied heavily on Justice Field's dissent in *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892), which has been characterized as "an unequivocal statement that the Constitution demands that the punishment fit the crime." *Carmona*, 576 F.2d at 421 (dissenting opinion). Both federal and state courts generally cite *Weems* for the principle that excessive sentence length alone can render a punishment unconstitutionally cruel. *Katkin*, *supra* note 6, 21 Buffalo L. Rev. at 117 & cases cited at n.82; Comment, *supra* note 8, 24 Buffalo L. Rev. at 831-35 (discussing cases); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635, 640 (1966); Brief for Petitioner at 34 n.30, *Coker v. Georgia*, 433 U.S. 584 (1977).

The en banc court in this case refused to recognize *Weems* as good law because of a subsequent decision in *Badders v. United States*, 240 U.S. 391 (1916), which the court below characterized as "summarily dismiss[ing] a proportionality attack on a five-year sentence." 587 F.2d at 655 n.7. But a five-year sentence hardly compares to a life sentence. Moreover, *Badders*, which does not mention *Weems*, is not even a disproportionality case: the convicted defendant's only Eighth Amendment objection challenged the mail fraud statute's making the deposit of each letter a separate offense. See 240 U.S. at 393.

ate in length since *Weems*,¹⁰ recent decisions appear to endorse the continuing vitality of the *Weems* proportionality principle as a restriction on excessively long sentences.¹¹

B. Under the *Coker v. Georgia* Tests, Rummel's Sentence Is Excessive.

As pointed out recently by Justices Marshall and Powell in dissenting from denial of certiorari in *Carmona v. Ward*, ____ U.S. ___, ___, 99 S. Ct. 874, 877 (1979), denying cert. to 576 F.2d 405 (2d Cir. 1978)

¹⁰ The Court first applied the Eighth Amendment to the States through the Fourteenth Amendment's Due Process Clause in 1962. See cases cited in note 5 *supra*; cf. *O'Neil*, 144 U.S. at 331-33 (rejecting an Eighth Amendment claim on grounds that the issue was not properly presented and that the Eighth Amendment does not apply to the States). Before 1962, the Court discussed the Eighth Amendment in only nine cases. Radin, *supra* note 8, 126 U. Pa. L. Rev. at 997.

¹¹ Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1378 & n.164 (1979) (citing cases); see, e.g., *Coker*, 433 U.S. at 592 (White, Stewart, Blackmun & Stevens, JJ., plurality opinion); *Gregg*, 428 U.S. at 173 (Stewart, Powell & Stevens, JJ., plurality opinion), quoted approvingly in *Ingraham*, 430 U.S. at 691 n.9 (White, Brennan, Marshall & Stevens, JJ., dissenting); *Furman*, 408 U.S. at 272 n.14 (Brennan, J., concurring); *id.* at 457 (Powell, Burger, Blackmun & Rehnquist, JJ., dissenting). See also *Bordenkircher v. Hayes*, 434 U.S. 357, 370-71 (1978) (Powell, J., dissenting). The general principle seems indisputable, since without it a statute mandating a life sentence upon conviction of one minor parking violation could not be challenged.

(mandatory life sentence for possession of small amount of cocaine):

Most recently, in *Coker v. Georgia*, 433 U.S. 58 . . . (1977), the Court refined the test for assessing Eighth Amendment challenges, concluding that

"a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Id.* at 592. . . .

In holding the Georgia death penalty for rape invalid on the latter ground, the Court followed the approach of *Weems*, focusing on the character of the crime, the punishment for the same offense in other jurisdictions, and the penalty for similar crimes in the same jurisdiction.

As articulated in *Coker*, the two excessiveness tests are disjunctive: a punishment that fails under either standard is invalid. Rummel's sentence easily qualifies as excessive under the second *Coker* test and probably satisfies the first test.

1. A Mandatory Life Sentence Is Grossly Disproportionate to the Severity of the Offenses Alleged and Proved.

a. Rummel's Offenses Do Not Justify a Mandatory Life Sentence.

(i) *The Three Petty Offenses for Which Rummel Received a Life Sentence Threatened Neither Violence Nor Societal Injury.*

As the Fifth Circuit panel pointed out, 568 F.2d at 1198 (A. 16), none of the offenses for which Rummel received his life sentence, singly or in sum,¹² justify a severe penalty. In none did Rummel carry a weapon, employ sophisticated implements of crime, or demonstrate any skill in crime. None involved violence or even the threat of violence or danger to anyone.¹³

¹² Since all three of Rummel's offenses are petty, the issue whether a proportionality test should consider all offenses or only the most recent crime need not be decided in this case. See *Bordenkircher*, 434 U.S. at 371 (Powell, J. dissenting) (characterizing as having limited "societal implications" a conviction for forging an \$88.30 check and suggesting the inappropriateness of applying a habitual offender statute to such an offender notwithstanding prior convictions for detaining a female and robbery); Note, *Recidivist Laws Under the Eighth Amendment—Rummel v. Eselle*, 10 Tol. L. Rev. 606, 637-39 (1979) (suggesting that only the most recent offense should appear in the proportionality equation); Note, 1978 Wis. L. Rev. 253, 264 (pointing out that in *Coker* past criminality did not justify imposition of capital punishment for subsequent rape). See also note 38 *infra* & accompanying text. For a condemnation of the rationale that punishment should be increased based on previous offenses, see G. Fletcher, *Rethinking Criminal Law* § 6.6.2, at 459-66 (1978).

¹³ Compare *Williams*, *The Courts and Persistent Offenders*, 10 Crim. L. Rev. 730, 737 (1963) (quoting a 1911 memorandum that originated the preventive detention system for recidivists in England, which insists that preventive detention ought not apply to

Significantly, the primary offense caused no serious harm, even financial, to the victim,¹⁴ as evidenced by the victim's testimony that he had agreed to drop charges in return for partial reimbursement (R. 158-59; see note 2 *supra* & accompanying text). Commentators uniformly condemn the imposition of a life sentence for comparatively petty offenders, even incorrigible ones, as offensive to universal standards of decency.¹⁵ The State's previous suggestion that

petty thieves, absent violence, weapons, or skill); Pub. L. No. 91-452, tit. X, § 1001(a), 84 Stat. 948, codified at 18 U.S.C. § 3575 (1976), authorizing enhanced sentence as "dangerous special offenders" for defendants whose pattern of criminal conduct (1) constitutes a substantial source of their income and (2) manifests "special skill or expertise," defined to include

manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of criminal conduct, the enlistment of accomplices in such conduct, the escape from detection or apprehension for such conduct, or the disposition of the fruits or proceeds of such conduct.

Id. § 3575(e)(2).

¹⁴ See Radin, *supra* note 8, 126 U. Pa. L. Rev. at 1055 (the second Coker test focuses on whether the offender "deserves" the sanction imposed in light of the seriousness of the offense to both the victim and society); Jeffries & Stephan, *supra* note 11, 88 Yale L.J. at 1378 n.168 (a relevant standard for determining the "nature" of the offense is "the directness of the harm to others").

¹⁵ See, e.g., Katkin, *supra* note 6, 21 Buffalo L. Rev. at 120; Packer, *supra* note 7, 77 Harv. L. Rev. at 1080-81. Theft in particular is usually rated as one of the least serious crimes because it is not an offense that "threatens the underpinnings of

Rummel's conduct demonstrates "a real possibility that he would use a weapon to commit his next crime," Respondent's Opposition to Petitioner's Amended Motion for Release at 2, *Rummel v. Estelle*, 568 F.2d 1193 (5th Cir. 1978), is ludicrous. The three petty offenses triggering Rummel's life sentence in no way justify the inference that in the future he will injure anyone or harm society. Whether considered in relation to the actual or potential harm caused by the offenses, Rummel's motivation and the temptation he faced before committing each offense, or his "moral fault,"¹⁶ the mandatory life sentence imposed here cannot be justified.

the social order." Wechsler, *Sentencing Innovations*, in *Sentencing Institute: Violence Today—A Judicial Concern*, 46 F.R.D. 497, 524-25 (1968). For a history of theft, see G. Fletcher, *Rethinking Criminal Law* ch. 1-2, at 1-113 (1978). It would be difficult to find three felonies less serious than Rummel's. Compare Tex. Penal Code § 31.03 (d)(4)(A) (Vernon Supp. 1978) (making pig and goat theft a felony, regardless of value); *id.* § 31.07 (making the intentional unconsented use of another's boat or car a felony). See also Comment, *A Closer Look at Habitual Criminal Statutes: Brown v. Paratt and Martin v. Paratt, A Case Study of the Nebraska Law*, 16 Am. Crim. L. Rev. 275, 292 & n. 113 (1979) (citing Rummel as an example of defendants treated unfairly by application of a statute assessing high minimum mandatory penalties).

For an attempt to develop measures of the seriousness of offenses, see T. Sellin & M. Wolfgang, *Delinquency: Selected Studies* (1969).

¹⁶ Compare Coker, 433 U.S. at 600 (comparing murder and rape in the severity of harm caused and the "moral depravity" of the

Moreover, such harsh punishment for petty thieves is illogical. As the Fourth Circuit noted in *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied as untimely filed*, 415 U.S. 938 (1974) (holding grossly excessive a mandatory life sentence for writing \$50 check on insufficient funds, interstate transportation of forged checks totaling \$140, and perjury at son's murder trial):

Is it a rational exercise of state police power to put a man away for life—at tremendous expense to the state—because over a 20-year period he passed or transported three bad checks and might do it again? Life imprisonment is the penultimate punishment. Tradition, custom, and common sense reserve it for those violent persons who are dangerous to others. It is not a practical solution to crime in America. Aside from the proportionality principle, there aren't enough prisons in America to hold all the Harts that afflict us.

Id. at 141.

offender). See generally Note, *supra* note 9, 79 Harv. L. Rev. at 636; Jeffries & Stephan, *supra* note 11, 88 Yale L.J. at 1371-72, 1378 n.168. Although Rummel concedes that intent is an element of all three of his offenses, see Tex. Penal Code arts. 979, 996, 1410, 1413, 1555b (1925), intent to defraud of small amounts of money can hardly compare under any criteria with intent to injure or kill.

(ii) *The En Banc Court Erred in Refusing to Consider the Nature of the Offenses Triggering Application of the Habitual Offender Statute.*

Although the en banc court conceded that proportionality analysis requires consideration of the nature of the offense, it justified its rejection of Rummel's claim in part by refusing to consider the nature of the underlying offenses for which the habitual statute mandated Rummel's life sentence on the grounds that (1) the sentence was imposed for the commission of any three separate and distinct felonies, irrespective of the nature of those felonies, and (2) because Rummel has demonstrated that he cannot conform to society's rules, Texas can brand him a habitual criminal and imprison him for life, subject only to the Parole Board's exercise of its virtually unfettered discretion to parole him if he behaves. 587 F.2d at 659 (A. 36). But the issue is not whether Texas can classify Rummel a habitual offender or enhance his punishment, which Rummel concedes, but whether Texas can enhance his punishment by so much for so little.¹⁷ By refusing to consider the nature of the underlying off-

¹⁷ The en banc opinion challenges Rummel's assertion that his offenses are more trivial than most others and asks "by what authority does Rummel denigrate [sic] the interest society has in punishing his crimes?" 587 F.2d at 662 n.29 (A. 41 n.29). But Rummel does not challenge the State's right to punish him; he questions only the excessiveness of that punishment for such petty offenses.

fenses, the en banc court converted Rummel's as-applied challenge into a *per se* challenge and in effect precluded any as-applied challenge to the habitual offender statute, regardless of the triviality of the offenses, as long as those offenses are punishable as criminal. Under the en banc court's rationale, if the State can punish a trivial traffic offense as a crime, then it can punish the third commission of such an offense with a life sentence.

(iii) The Mere Possibility of Parole Is No Substitute for a Shorter Sentence, Since Rummel Has No Right to Parole and Lifetime Parole Makes Him a Perpetual Prisoner.

In comparing the seriousness of Rummel's three offenses with the harshness of his sentence, the en banc court discounted the length of Rummel's sentence by the probability of parole based on Texas' liberal system of awarding good time credits, 587 F.2d at 657-59 (A. 33-35), and considered only the constitutionality of an undefined, possibly lesser sentence. The court ultimately conceded that "if the court is forced to assume that Rummel's sentence is automatically and invariably one for his natural life, then the [panel] majority's assertion [that Rummel's sentence is grossly disproportionate to his offenses] is probably accurate." *Id.* at 659 (A. 37). Thus, if the en banc court had viewed Rummel's sentence as the term he ac-

tually received, it probably would have decided the case differently.

Several reasons dictate against consideration of good time credit and parole possibilities, especially in the manner in which the en banc court relied on the Texas system. First, as pointed out numerous times by the en banc dissent, *see, e.g.*, 587 F.2d at 666-69 (A. 45-51), accumulation of good time credit is useless to someone given a life sentence, except with respect to determining when one first becomes eligible for parole consideration.¹⁸ Even parole eligibility is of

¹⁸ The en banc court explained the operation and interaction of the Texas good time credit and parole programs:

In Texas, a prisoner is eligible for parole after receiving credit for twenty years' imprisonment or after serving one third of his sentence, whichever is less. Tex. Code Crim. Pro. Ann. art. 42.12 § 15(a) (Vernon 1974). Since Rummel is serving a life sentence, he is eligible for parole after accruing credit for twenty years. Texas employs a well-developed system of awarding good time credits. Class I prisoners earn twenty days "good time" per month. Class II prisoners earn ten days "good time" per month, Tex. Civ. Stat. Ann. art. 61841 (Vernon 1974), and State-approved trustees earn thirty days credit for each thirty days service. Tex. Penal Code Ann. art. 61841 (Vernon 1974) [sic]. Thus, a State-approved trustee can serve a life sentence in ten years.

...

... As a popular journal has stated:

... State Approved Trusties (SAT)—half the inmate population—draw two-for-one good time. Every month they serve puts two months in their time accounts; a man with ten remaining years who is made an SAT serves those ten

negligible importance since, as a source quoted by the en banc court points out, "Texas . . . is the most re-

years in five calendar years. Good time earned also brings parole-eligibility dates closer. The men in the Line are in one of three grades. Lines II and III are disciplinary: Line II draws forty days for every thirty days served, and Line III draws day for day. Everyone else, even men just arriving at the Diagnostic Unit in Huntsville in custody of their county sheriffs, is Line I, which draws fifty days for every thirty served.

Texas has the most liberal good-time laws in the country, which is curious since Texas also gives the longest sentences and is the most reluctant to grant parole.

Jackson, *Hard Times*, Texas Monthly, December 1978, 138 at 258.

Considering Texas' good time system, the inevitable conclusion is that Rummel can be eligible for parole at the end of twelve calendar years, or considering his trusty status, even earlier.

587 F.2d at 657-59 (A. 34-35) (footnotes omitted).

The en banc court, in stating that "a [prisoner earning maximum good time credit] can serve a life sentence in ten years," *id.* at 658 (A. 34), apparently misconstrued the interplay between the good time credit and parole systems. With maximum good time credit, a prisoner can become eligible for parole in ten years, but he can never serve a life sentence, even if paroled. See text accompanying notes 23-24 *infra*. Thus, the example given by the court below, 587 F.2d at 660 (A. 38), of two states—one that gives a fixed, ten-year sentence and one that assesses a thirty-year sentence with good time credit that makes actual time served only ten years—breaks down when applied to a prisoner given a life sentence, since no amount of good time credit permits one to completely discharge a life sentence.

luctant [State in the country] to grant parole." *Id.* at 658 (A. 35).

Second, this Court recently held in *Geenholz v. Inmates*, ____ U.S. ___, 99 S. Ct. 2100 (1979), that the possibility of parole creates no liberty interest protected by Due Process, only "a mere hope" that parole will be obtained, *Id.* at 2105. Consequently, a convicted person has "no constitutional or inherent right . . . to be conditionally released before the expiration of a valid sentence." *Id.* at 2104.¹⁹

Thus, to deny Rummel his constitutional claim merely because he becomes eligible for parole in twenty years, or less with good behavior, and might eventually be paroled deprives him permanently of the only forum in which he can seek vindication of his constitutional objection to actually serving a life sentence, acknowledged as legitimate by the en banc court. No court will ever again consider his excessive sentence claim before the unconstitutional harm occurs.²⁰ Accepting the mere possibility of parole as the

¹⁹ Compare *United States v. Addonizio*, ____ U.S. ___, ___, 99 S. Ct. 2235, 2242 (1979) (judge has no "enforceable [sic] expectations" concerning actual release of sentenced defendant short of expiration of statutory term).

²⁰ Even if the Court were to guarantee review should the Parole Board repeatedly deny Rummel parole, waiting to see how the Parole Board will respond is only slightly less useless than relying on the possibility of intervention by the Governor as an excuse for refusing to prevent an unconstitutionally prescribed

proper measure of sentence length even though the legislature mandates a life sentence "make[s] prosecutors, prison wardens, and parole boards the ultimate arbiters in eighth amendment analysis, in which their discretion in enforcing the legislative mandate is substituted by the judiciary for its own."²¹

Such a delegation of the Eighth Amendment determination neither guarantees nor justifies even a realistic expectation that the criteria used by the Parole Board will conform to the Eighth Amendment's proportionality requirement. The Parole Board's decision will depend largely on Rummel's behavior in prison, as well as several other factors not entirely within

death penalty until after the execution: eventual Court action in either situation occurs too late to prevent the unconstitutional injury.

If Texas law mandated a life sentence for a first offense parking violation, surely the possibility of parole within twenty-four hours would not prevent such a statute from being branded grossly disproportionate. *Compare Bailey v. Blackburn*, No. 78-3306 (5th Cir., June 15, 1979) (per curiam) (affirming dismissal without prejudice for failure to exhaust state remedies on Eighth Amendment claim against Louisiana habitual offender statute—which upon fourth felony conviction mandates sentence of between 20 years (or maximum, whichever is greater) and life—on ground that case may be distinguishable from Rummel's claim because Louisiana law denies parole to prisoner assessed life sentence unless sentence is first commuted by Governor to term of years).

²¹ Note, *supra* note 12, 10 Tol. L. Rev. at 633 (criticizing the *Rummel* en banc decision).

Rummel's control, and only insignificantly on the offenses for which he was sentenced. *Rummel*, 587 F.2d at 668-69 (A. 49-51) (en banc dissenting opinion).²²

Third, if a life sentence without possibility of parole for three petty, nonviolent offenses would be unconstitutional, as the en banc court apparently conceded, 587 F.2d at 659 (A. 37), then surely the added "crime" of a "bad attitude" in prison, virtually guaranteeing rejection of a prisoner's parole application and assuring him of lifetime imprisonment, should not make the sentence any less constitutionally infirm. No one would argue that a "bad attitude" makes more ac-

²² The Parole Board has indicated some of the factors it considers in determining an inmate's readiness for parole:

A clear conduct record is not, in itself, sufficient grounds for granting parole. [T]he traditional prison program of religion, work education and discipline, even at its best, will not guarantee rehabilitation nor genuine readiness for parole. A prisoner may participate zealously in the religious program, he may work hard and he may achieve in education programs; he may keep a spotless conduct record and yet not be genuinely ready for parole. What he achieves in prison in these areas may not be indicative of real feelings, real attitudes and readiness for society. The inmate must be studied from all possible angles to determine if his good behavior is for the benefit of the Parole Board or is actually indicative of a real desire to change.

Texas Board of Pardons and Paroles, 1978 *Handbook on Parole, Mandatory Supervision and Executive Clemency* 23 (1978). See generally *id.* at 23-26 (listing other considerations, including the number of prior commitments, age at time of first arrest, personal habits, friends, family background, and the readiness of family and community to receive a parolee).

ceptable the rack or some other cruel method of torture, even if a "good attitude" carried with it the possibility of a reprieve.

Finally, the en banc court treated a trusty's eligibility for parole after serving twelve years not only as a guarantee of parole but also as the equivalent of complete freedom, *see id.* at 658, 660 (A. 34, 38); *cf. id.* at 659 n.19 (A. 36 n. 19), which it is not, *see id.* at 666, 668-70 (A. 45-46, 48-49, 52-53) (dissenting opinion). Parole in Texas means release only from incarceration, not from State custody.²³ If paroled, Rummel would be subject to rules and conditions adopted by the Board of Pardons, Tex. Code Crim. Pro. Ann. art. 42.12, §§ 2c, 15(g), 20 (1979), for life, *see id.* § 23, with the threat of prison hanging over him for even minor, noncriminal parole violations, *compare id.* §§ 2c, 15(g), *with id.* §§ 21-22.²⁴

²³ Tex. Code Crim. Pro. Ann. art. 42.12, § 2c (1966); *cf.* Jones v. Cunningham, 371 U.S. 236, 241-43 (1963) [holding that a state prisoner placed on parole is "in custody" within the meaning of the habeas corpus statute because of "significant restraints" on a parolee's liberty].

²⁴ Cf. Erikson & Gibbs, *On the Perceived Severity of Legal Penalties*, 70 J. Crim. Law & Criminology 102 (1979). Such sanctions smack of those condemned as excessive in *Weems*:

His prison bars and chains are removed, it is true, after [his term of imprisonment ends], but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within the voice and view of the criminal magistrate, not being able to change his domicile without giving notice to the "authority imme-

Thus, Rummel is a perpetual prisoner. No matter how much he rehabilitates during the next approximately 13,770 days of his life expectancy, he will either die in prison or live on perpetual parole, with the ever-present possibility of re-incarceration. Such a depressing prospect will inevitably breed hopelessness and preclude effective treatment and rehabilitation.²⁵ In the words of one expert:

If he qualifies for parole he may be allowed to participate in the life of society but he must suf-

diately in charge of his surveillance," and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty. No circumstance of degradation is omitted. Such penalties [including chains and hard, painful labor] for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American Commonwealths, and believe it is a precept of justice that punishment for crimes should be graduated and proportioned to offense.

217 U.S. at 366-67.

²⁵ Grosman, *The Treatment of Habitual Criminals in Canada*, 9 Crim. L.Q. 95, 104 (1966-1967); Klein, *Habitual Offender Legislation and the Bargaining Process*, 15 Crim. L.Q. 417, 424-25 (1972-1973); *compare* Advisory Council of Judges of the National Council on Crime and Delinquency, *Model Sentencing Act* § 5 (1963) [hereinafter cited as "Model Act"] (providing a life term for no offense except first-degree murder), *with id.* §§ 5-6, comment ("A life term, even though the offender is subject to release, is a psychological setback against any treatment other than the passage of time").

fer the degrading experience of knowing that he will never be free from penal sanctions. For no matter how rehabilitated he may become he must live the rest of his life on parole with the real possibility of re-internment if he violates any of the conditions of his parole. It is not within this man's power to serve his sentence, pay his penalty and enter society again as a free and effective citizen.²⁶

Of course, the State cannot guarantee that Rummel will ever be released. The length of time he will serve depends not on the sentencing court or this Court, but on the Parole Board. If the mere possibility that an administrative agency might someday correct an injustice could stay the Court's proper exercise of its power to protect constitutional rights, no sentence would be too harsh, even if the Board never again paroled even a first-offender petty check forgerer. The fact that Rummel will never fully regain his freedom from the threat of life imprisonment and has no judicial recourse if prison and parole authorities choose to require that he serve his entire life sentence for trivial property offenses involving only \$230.11 is the cruel and unusual punishment that he challenges here.

²⁶ Grosman, *supra* note 25, 9 Crim. L.Q. at 100.

b. No Jurisdiction in the United States or the Free World Punishes Habitual Offenders as Harshly as Texas; and the Trend in Habitual Offender Legislation Is Away from Mandatory Life Sentences and Toward a Requirement that at Least One Offense Involve Violence.

An examination of punishment in other jurisdictions for the same offense²⁷ reveals that currently only one other state—Washington—retains the statutory authority to impose a mandatory life sentence upon those convicted of any three felonies,²⁸ and the Washington Supreme Court has indicated that it probably would not permit application of the statute in a case like Rummel's.²⁹ Every other state and territorial habitual offender statute requires commission of more offenses, at least one violent crime, or both; imposes

²⁷ See Table 3 (C. 28-112), which lists for each state and territory and under federal law, in chronological order, the minimum and maximum punishments prescribed by each felony habitual offender statute in effect since 1800; Table 4 (C. 113-37), which categorizes—by length and type of punishment and number and type of triggering offenses—and lists all current habitual offender legislation.

²⁸ The Fourth Circuit in *Hart*, 483 F.2d 136, limited the application of West Virginia's law requiring a life sentence after any three felony convictions.

²⁹ *State v. Lee*, 558 P.2d 236, 240 n.4 (Wash. 1976) (en banc) (dictum) (distinguishing and impliedly approving *Hart*, see note 28 *supra*). See also *State v. Gibson*, 553 P.2d 131, 135-36 (Wash. App. 1976) (same).

a sentence substantially less than life; or grants discretion to the sentencing authority.³⁰ Congress limits

³⁰ The en banc opinion's suggestion that (1) six states might sentence Rummel automatically to a life term and (2) judges and juries in eleven states might have discretion to give him a life sentence, 587 F.2d at 659-60 (A. 37), is inaccurate or irrelevant for the following reasons:

- (1) it incorrectly equates discretionary and mandatory sentences, *see* cases cited at 587 F.2d at 669-70 (A. 51-53) (dissenting opinion) (discussing cases decided under the *Ex Post Facto Clause*);
- (2) it considers an alleged fourth felony conviction, 587 F.2d at 659 (A. 37), on the basis of a few documents contained in the record (A. 1-3) but never introduced or explained at trial, that could not have been used for enhancement since that conviction occurred, if at all, on the same day as Rummel's conviction under article 63 (*see* A. 3) and since there is no evidence that it was sustained on appeal, *see, e.g.*, *Tyra v. State*, 534 S.W.2d 695, 697-98 (Tex. Crim. App. 1976), and that is irrelevant in any event since it was not one of the offenses named in Rummel's indictment (*see* R. 80-81);
- (3) it misconstrues eight state statutes—those of Arkansas, Idaho, Louisiana, New Jersey, New Mexico, North Carolina, South Dakota, and Vermont, 587 F.2d at 659-60 & nn.21-23 (A. 37 & nn.21-23)—that could not apply to Rummel because of either the nature of his offenses, when they occurred, or both, *see* Table 4 (C, 113-37); and
- (4) it includes two states—West Virginia and Washington, 587 F.2d at 659 & n.20 (A. 37 & n.20)—in which prosecutors are limited by judicial decision, *see* note 29 & text accompanying note 28 *supra*.

The en banc court attempted to demonstrate that the mandatory maximum ten-year sentence that Georgia courts must assess a habitual offender whose last offense is theft is "approximately the same" as Rummel's life sentence because Rummel might be

enhanced punishment for violations of federal laws to only twenty-five years in prison, requires a finding of dangerousness, and insists that the term be "not disproportionate in severity to the maximum term otherwise authorized by law for such felony." Pub. L. No. 91-452, tit. X, § 1001(a), 84 Stat. 948, codified at 18 U.S.C. § 3575(b) (1976).³¹ All major model legislation and reports condemn life imprisonment and recommend long terms only for those who have committed particularly reprehensible crimes.³² Indeed, it appears

paroled in twelve years if (and only if) (1) he remains a trusty during that period and (2) the Parole Board chooses to grant parole. 587 F.2d at 660 (A. 38). But even if Rummel were assured of parole, a lifetime of restrictions can hardly be dismissed as insignificant when compared to the *unconditional* release after ten years that a Georgia convict would receive. Moreover, Georgia assesses a mandatory maximum of ten years for theft only on someone convicted four times and only if the fourth offense was committed after the third conviction, so that Rummel could not be sentenced under that provision of Georgia law.

³¹ For the origin of this proportionality language, see *Hearings on S. 30 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 185 (1969); Katkin, *supra* note 6, 21 Buffalo L. Rev. at 118.

³² See e.g., ABA Project on Standards for Criminal Justice, *Sentencing Alternatives and Procedures* § 2.5(c), at 81; § 3.3, at 160-62 (Approved Draft 1968) [hereinafter cited as "ABA Sentencing Alternatives"]; ALI, *Model Penal Code* §§ 6.06(1), 6.07(1), 7.03 (1962); *Model Act*, *supra* note 25, §§ 5, 7-9.

that no other nation in the Free World punishes recidivists as severely as Texas does.³³

It has been argued that the uniqueness in the severity of the punishment Texas mandates for three-time felons should not weigh against the State. According to this argument, if the Texas approach succeeds in reducing the incidence of recidivism, other States will eventually choose to adopt our method:

[O]ur federal system . . . allows state legislatures within broad limits, to experiment with laws, both criminal and civil, in the effort to achieve socially desirable results. . . .

Statutory provisions in criminal justice applied in one part of the country can be carefully watched by other state legislatures, so that the experience of one State becomes available to all. . . .

Texas will not remain one of the few jurisdictions imposing a "life" sentence with possibility of parole on habitual criminals if in the future the incidence of recidivism drops relative to States without such a statute. *Social change in such matters generally reveals itself slowly.* The current view of other states may be altered on the

³³ Compare Timasheff, *The Treatment of Persistent Offenders Outside of the United States*, in 40 J. Crim. L. & Criminology 455, *passim* (1940); Tappan, Book Review, 65 Harv. L. Rev. 1092, *passim* (1952) (reviewing N. Morris, *The Habitual Criminal* (1951)). See generally Coker, 433 U.S. at 596 n.10 (indicating that the penalties imposed by foreign nations are relevant to a proportionality analysis).

basis of Texas' success or failure with the habitual statute.

Brief in Support of Motion for Rehearing in [sic] Banc of the Criminal District Attorney of Bexar County, Texas, as Amicus Curiae at 4-5, *Rummel v. Estelle*, 568 F.2d 1193 (5th Cir. 1978) (emphasis added).

This argument overlooks several historical factors. First, there is no proof that habitual offender statutes have ever worked as effective deterrents. Compare text accompanying notes 55-58 *infra*. Second, if Texas hopes eventually to demonstrate success in deterring recidivism, it may have long to wait, since Texas has punished third-felony offenders with a mandatory life sentence since 1856. See 1856 Tex. Laws, Paschal, *Digest of Texas Laws* art. 2464 (1866). Moreover, seventeen states have already "experimented" with a mandatory life sentence for an average of more than forty years apiece, apparently concluded that such a harsh penalty is either ineffective, counterproductive, or inhumane, and revised their laws by either (1) making the sentence discretionary [9 States], (2) limiting the statute's application to violent felonies [1 State], (3) both (1) and (2) [2 States], (4) reducing the mandatory sentence to a term less than life [4 States], or (5) both (1) and (4) [1 State].³⁴ This trend toward light-

³⁴ Compare Table 5 (C. 138-41) (listing every State that has ever enacted a recidivist statute mandating a life sentence without a violent-crime requirement, giving the years during which each statute applied, and describing each statute), and Table 8 (C. 204) (categorizing and totaling the current statutes), with

er, discretionary sentences and a violent-crime limitation, beginning in the mid-1920's,³⁵ is nationwide.³⁶

To suggest that the Texas habitual offender statute will serve as a model for other states ignores history and defies logic. Such reasoning would justify the crudest torture. But the Eighth Amendment, while not denying states the right to experiment, imposes outer limits on what they may do in the laboratories.

C. Texas Punishes No Other Criminal Except One Convicted of a Capital Offense as Harshly as It Punishes a Three-Time Felon, and It Punishes More Dangerous Criminals Much Less Severely.

Table 3 (C. 28-112), Tables 6A-E (C. 142-97), and Tables 7A-F (C. 198-203).

³⁵ General recidivist statutes were a popular legislative response to the dramatic increase in crime—especially gangsterism and racketeering under Prohibition—that occurred after World War I. Monograph, *The Treatment of the Recidivist in the United States*, 23 Can. B. Rev. 638, 642, 660 (1945); see Note, *Court Treatment of General Recidivist Statutes*, 48 Colum. L. Rev. 238, 238 (1948). For the European origin of recidivist legislation, see Katkin, *supra* note 6, 21 Buffalo L. Rev. at 99-101; Timasheff, *supra* note 33, *passim*. For the early American statutes, see Monograph, *supra*, 23 Can. B. Rev. at 641-45.

³⁶ See Tables 6-8 (C. 142-204), which categorize, list, and total—by length and type of punishment and type of triggering offenses—the federal, state, and territorial jurisdictions with habitual offender statutes at each five-year interval since 1900.

An examination of punishment imposed in Texas for other offenses³⁷ “highlights the irrational severity of the life sentence mandated by Article 63.” *Rummel*, 568 F.2d at 1199 (A. 17) (panel opinion). As the panel opinion points out, *id.* at 1199 & n.9 (A. 17 n.9), only capital murder is punishable by a mandatory life sentence (or death), Tex. Penal Code Ann. § 19.03 (Vernon 1974). The contrast between even a one-time murderer and a three-time petty offender like Rummel is startling.

First-degree felonies, which include many serious crimes of violence, are punishable by a discretionary term of between 5 and 99 years. Tex. Penal Code Ann. § 12.32 (Vernon 1974); *Rummel*, 568 F.2d at 1199 & n.10 (A. 17 & n.10) (panel opinion). Second-degree felonies—many only marginally less violent than first-degree felonies—are punishable by a discretionary term of between 2 and 20 years and a fine not exceeding \$10,000. Tex. Penal Code Ann. § 12.33(a) (Vernon 1974); *Rummel*, 568 F.2d at 1199 & n.11. After the second commission of any felony, the punishment is that of the next highest category of felony. Tex. Penal Code Ann. § 12.42(a)-(c) (Vernon 1974). Thus, such a repeater can be sentenced to a term of between 2 and 20 years if the second conviction is for a third-degree felony, and between 5 and 99 years if for a second-degree felony. Although ninety-nine years is equiva-

³⁷ For a list of offenses under Texas law, categorized by degree, see Table 2 (C. 22-27).

lent to a life sentence, its imposition for a second-degree felon with a prior felony conviction is discretionary, not mandatory.

The en banc court refused to compare the punishment for various single offenses in Texas with the life sentence Rummel received for three petty offenses, on the ground that Rummel's sentence resulted from his status as a habitual criminal, not from the commission of any one offense. 587 F.2d at 660 (A. 36). Rummel's status, however, is already based in part on the nature of each offense (*i.e.*, all must be felonies), and surely no one would contend that Rummel's repetitive but petty, cheating conduct caused more harm to society than the commission of one or two murders, rapes, or kidnappings.

In further contrast, since 1974 Rummel's last offense has carried a maximum sentence in Texas of only *one year*, even for a person with two prior felony convictions.³⁸

³⁸ If Rummel's theft by false pretext had been committed after January 1, 1974, it would have been only a misdemeanor, 1973 Tex. Gen. Laws, c. 399, § 31.03(d)(3), at 930, *as amended*, Texas Penal Code § 31.03(d)(3) (Vernon Supp. 1978) (theft of property valued between \$20 and \$200); *see* Texas Penal Code § 31.02 (Vernon 1974) (theft as defined in section 31.03 includes [in subsection (b)(1)] the offense previously called theft by false pretext), carrying a maximum punishment of only one year in prison and a \$2,000 fine, *id.* § 12.21. Even under the new Penal Code's habitual misdemeanor statute, *id.* § 12.43(a), which applies to anyone on trial for a Class A misdemeanor who has a prior

2. The Life Sentence Mandated by Texas Law Makes a Negligible Contribution to Acceptable Goals of Punishment.

After rejecting Rummel's claim that his life sentence is grossly disproportionate to his crimes, the en banc court refused to consider the statutory purposes of the Texas recidivist law,³⁹ even though *Coker* makes clear that a punishment may be excessive if it fails to make a measurable contribution to any legitimate penal goal. 433 U.S. at 592; *see id.* n.4 (the converse applies).⁴⁰ Every conceivable legislative pur-

conviction for a Class A misdemeanor or for any felony, Rummel's prison term could not exceed one year.

This reduced sentence highlights both the relatively trivial nature of the offenses and the public's increasingly more sophisticated enlightenment concerning incarceration and treatment of habitual offenders. *Compare Weems*, 217 U.S. at 378 (the cruel and unusual punishment clauses is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice") (*quoted in Furman*, 408 U.S. at 242 (Douglas, J., concurring)).

³⁹ 587 F.2d at 661 (A. 39). *See also note 57 infra.*

⁴⁰ *Compare Furman*, 408 U.S. at 279 (Brennan, J., concurring) (pointing out that the standard as expressed in *Coker* incorporates the standard as expressed in *Hart*, 483 F.2d 136). *See also id.* at 300, 311, 331 (views of Justices Brennan, White, and Marshall, respectively, on the need for a "least drastic means" test); Jeffries & Stephan, *supra* note 11, at 1365-66 (discussing *In re Winship*, 397 U.S. 358 (1970), which held that Due Process requires for conviction proof beyond a reasonable doubt of every element of the offense charged, and arguing that the purpose of

pose behind Rummel's life sentence—whether isolation, deterrence, rehabilitation,⁴¹ or retribution⁴²—either is undermined by article 63 or is served so irrationally by the law's application to Rummel that the objective becomes unacceptable.⁴³

a. Since Judges and Juries Give Lengthy Sentences To Non-Petty Offenders, Recidivist Laws Isolate Only Petty Offenders, Who Remain Incarcerated for a Much Longer Period than Societal Protection Requires.

Isolation of the habitual criminal for societal protection is an acceptable objective only to the extent

the presumption of innocence as embodied in the reasonable doubt standard can be served effectively only if the State is required to prove beyond a reasonable doubt a "constitutionally adequate basis for imposing the punishment authorized").

⁴¹ *Rudolph v. Alabama*, 375 U.S. 889, 891 (1963) (Goldberg, Douglas & Brennan, JJ., dissenting from denial of certiorari); *Spencer*, 385 U.S. at 571 (Warren, C.J., concurring and dissenting); Tex. Penal Code Ann. § 1.02(1) (A)-(C) (Vernon 1974); *id.*, Practice Commentary; see *Packer*, *supra* note 7, 77 Harv. L. Rev. at 1079-81; Radin, *supra* note 8, 126 U. Pa. L. Rev. at 1028 & n.153.

⁴² *Id.*; G. Fletcher, *Rethinking Criminal Law* § 6.3.2, at 414-15 (1978).

⁴³ See generally Radin, *supra* note 8, 126 U. Pa. L. Rev. at 1053, 1055 (the Coker "measurable contribution" test appears to require that punishment yield some social gain, perhaps even a net gain compared to the harm caused by the pain inflicted on the offender).

that the punishment prescribed in penal statutes enacted for that purpose appears reasonably necessary to preserve public safety. Most recidivist laws, however, even those more rationally selective in their application than the Texas statute, are ineffective and superfluous to society's legitimate concern for protection. Studies consistently reveal that such statutes fail to isolate the true threat to the social order—the professional, dangerous criminal.⁴⁴ Such gangsters, by escaping detection or conviction, often have no prior record upon which to base a habitual offender charge⁴⁵ or shrewdly plea bargain for lighter sentences.⁴⁶ More-

⁴⁴ *Grosman*, *supra* note 25, 9 Crim. L.Q. at 101-04; *Katkin*, *supra* note 6, 21 Buffalo L. Rev. at 106-08, 112; *Klein*, *supra* note 25, 15 Crim. L.Q. at 421, 433-35; *Lynch*, *Parole and the Habitual Criminal*, 13 McGill L.J. 632, 633-34, 638, 644 (1967); *Murrah*, *The Dangerous Offender Under the Model Sentencing Act*, 45 F.R.D. 161, 165 (1967); *Tappan*, *supra* note 33, 65 Harv. L. Rev. at 1094; *Williams*, *supra* note 13, 10 Crim. L. Rev. at 730-31, 737; *Monograph*, *supra* note 35, 23 Can. B. Rev. at 663-64.

Statistics indicate that "most serious offenders never repeat their crimes." S. Rubin, *The Law of Criminal Correction* 466 (2d ed. 1973); cf. *Lynch*, *supra*, 13 McGill L.J. at 643 (parolees convicted for unpremeditated crimes have the lowest rate of recidivism). Thus, most nonprofessional convicts who commit one serious crime rarely become recidivists.

⁴⁵ *Klein*, *supra* note 25, 15 Crim. L.Q. at 423; *Monograph*; *supra* note 35, 23 Can. B. Rev. at 665.

⁴⁶ *Johnson*, *Sentencing in the Criminal District Courts*, 9 Hous. L. Rev. 944, 981 (1972); *Katkin*, *supra* note 6, 21 Buffalo L. Rev. at 109 (since cases involving professional criminals tend to be complex, prosecutors prefer to plea bargain for a lighter sentence);

over, judges and juries assess an offender with prior convictions indicating dangerousness such a long sentence for the most recent offense that the automatically enhanced sentence is superfluous.⁴⁷

Instead, recidivist laws typically ensnare mostly the petty thief, who may be a nuisance but threatens no one.⁴⁸ Ironically, by the time most such petty thieves are imprisoned as habitual criminals, their propensity for criminal activity has declined with age and maturity.⁴⁹ The result is a needless drain on state resources and the loss of potentially productive citizens. Even though society has a legitimate interest in removing such misfits from the general population for a time, when the actual sentence greatly exceeds that normally imposed on others with similar convictions who have not been charged as habitual offenders,⁵⁰

see Cuomo, Mens Rea and Status Criminality, 40 S. Cal. L. Rev. 463, 469 (1967).

⁴⁷ Katkin, *supra* note 6, 21 Buffalo L. Rev. at 106; Klein, *supra* note 25, 15 Crim. L.Q. at 423.

⁴⁸ See authorities cited in note 44 *supra*.

⁴⁹ Grosman, *supra* note 25, 9 Crim. L.Q. at 103; Klein, *supra* note 25, 15 Crim. L.Q. at 435; *see Model Act*, *supra* note 25, §§ 5-6, comment ("The surge of aggression, of violent action, is a characteristic of the young rather than the old offender.").

⁵⁰ A study indicates that with two prior convictions, Rummel probably would have received a 10-year sentence if he had not been convicted as a habitual offender. *See Comment, Texas Sentencing Practices: A Statistical Study*, 45 Texas L. Rev. 471, 482-83, 485, 491-93 (1967).

one can assume that societal protection does not warrant a large portion of the longer sentence⁵¹ and that the sentence thus serves no legitimate purpose.

b. Since Non-Petty Offenders Can Anticipate Lengthy Sentences from Judges and Juries, Habitual Offender Statutes Deter Only Petty Offenders, Who Would Be Effectively Deterred by a Much Shorter Sentence.

Even accepting the dubious assumption that the potential offender understands the nuances in each State's habitual offender statute,⁵² a punishment deters effectively only if it is proportioned to the gravity of the crime.⁵³ When petty theft and forgery are punished like armed robbery and murder, a criminal has

⁵¹ *Accord, Note, Statutory Structures for Sentencing Felons to Prison*, 60 Colum. L. Rev. 1156, 1159 (1960). Penologists generally recognize that a diagnosis of incorrigibility should grow out of a study of the offender's personality, not merely the number of prior convictions. E.g., *Monograph*, *supra* note 35, 23 Can. B. Rev. at 639 (forward by T. Sellin); *accord, Williams v. New York*, 337 U.S. 241, 247 & authorities cited in n.8 (1949).

⁵² *See generally Note, supra* note 51, 60 Colum. L. Rev. at 1159-60 (expressing skepticism).

⁵³ *See Wheeler, Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 848-50 (1972).

no incentive to commit the less serious offense, and real distinctions between offenses blur:

All penalties ought to be proportioned to the nature of the offense. . . . [W]here the same undistinguishing severity is exerted against all offenses, the people tend to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of lightest dye.⁵⁴

Moreover, habitual offender laws do not deter commission of serious offenses, since dangerous criminals surely harbor no illusions that upon apprehension and conviction they would be sentenced lightly if the enhancement statute did not exist.⁵⁵ At best, a harsh sentence like that imposed by article 63 deters only petty offenders who in and of themselves do not deserve long-term confinement⁵⁶ and would be deterred, if at all, by the prospect of a much less severe sentence.⁵⁷ More likely, however, is that fear of the extraordinary severity of a mandatory life sentence

⁵⁴ N. H. Const., Bill of Rights § 18 (1783), in 1 *The Bill of Rights* 377 (B. Schwartz ed. 1971); see Wheeler, *supra* note 8, 25 Stan. L. Rev. at 75; Williams, *supra* note 13, 10 Crim. L. Rev. at 737-38.

⁵⁵ Accord, Katkin, *supra* note 6, 21 Buffalo L. Rev. at 106. Statistics on sentencing in Texas document the severity of sentences imposed on violent felony offenders. See Comment, *supra* note 50, 45 Texas L. Rev. at 482-83, 485, 491-92.

⁵⁶ Accord, Katkin, *supra* note 6, 21 Buffalo L. Rev. at 106.

⁵⁷ The en banc court rejected this "lack of necessity" rationale based on the fear that the State could never prove that a sentence

would induce a previously convicted felon who commits a relatively trivial third offense to perpetrate a more serious crime (e.g., inflicting serious injury while resisting arrest) to avoid apprehension out of fear of a mandatory life sentence.⁵⁸

c. Life Imprisonment Will Not Rehabilitate.

No one could seriously contend that the prospect of permanent incarceration, or long-term confinement followed by permanent parole, serves a rehabilitative function. To the contrary, such a sentence psychologically devastates the recipient.⁵⁹ Even were this not

of one length deterred more effectively than a shorter sentence. 587 F.2d at 661 (A. 39-40) (quoting Wheeler, *supra* note 8, 25 Stan. L. Rev. at 77-78). But this criticism fails to recognize that (1) reserving the issue of who bears the burden of proof, Rummel has demonstrated that the punishment imposed is grossly excessive, and (2) if the inquiry is limited to whether a significantly less severe punishment would accomplish the purpose equally as well, the comparison would not require such fine distinctions.

⁵⁸ See Comment, *supra* note 8, 24 Buffalo L. Rev. at 809-10.

⁵⁹ Klein, *supra* note 25, 15 Crim. L. Q. at 424-25; see Williams, *supra* note 13, 10 Crim. L. Rev. at 731; Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems*, 56 Va. L. Rev. 602, 604 (1970); text accompanying notes 25-26 *supra*. In the graphic words of one prisoner who had undergone extensive psychotherapeutic treatment:

To be taken without consent from my home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver; to be re-made after some pattern of "normality" hatched in a

so, it is unclear how a third, longer term of imprisonment will rehabilitate the recidivist when it has twice failed.⁶⁰ Nonetheless, in the words of one commentator, the traditional method of treating the habitual criminal has been "to increase the severity of his punishment as if the remedy lay in increasing the dosage of medicine which failed to cure in small quantities."⁶¹

d. Retribution Is Permissible Only if Punishment Is Proportioned to the Offenses Being Punished.

Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I grown wise enough to cheat them with apparent success—who cares whether this is called Punishment or not?

Schreiber, *supra*, 56 Va. L. Rev. at 612.

⁶⁰ Accord, Lewis, *The Humanitarian Theory of Punishment*, 6 Res Judicatae 224, (1953); Comment, *Recidivism: The Treatment of the Habitual Offender*, 7 U. Rich. L. Rev. 525, 527 (1973); compare Tappan, *supra* note 33, 65 Harv. L. Rev. at 1094 (discussing the European system of imprisonment followed by a more lenient period of treatment). See generally Robison, *The Effectiveness of Correctional Programs*, 17 Crime & Delinquency 67, 71-72 (1971) (research suggests imprisonment does not rehabilitate a criminal and may cause positive harm); Schreiber, *supra* note 59, 56 Va. L. Rev. at 604 n.12. See also Monograph, *supra* note 35, 23 Can. B. Rev. at 638 (foreword by T. Sellin).

⁶¹ *Id.* at 637.

Rejected as a legitimate penal goal by many,⁶² retribution is a basic purpose of recidivist statutes.⁶³ The ancient doctrine of revenge recognizes that punishment for its own sake is acceptable, but only to the extent that it is proportional to the offense committed.⁶⁴

⁶² See, e.g., Comment, *supra* note 8, 24 Buffalo L. Rev at 809; compare Rudolph, 375 U.S. at 891.

⁶³ Monograph, *supra* note 35, 23 Can. B. Rev. at 640. Although true in general, the accuracy of this observation as the recidivist statute is applied must be questioned, since community outrage is usually a reaction to a defendant's most recent crime, virtually unaffected by the existence of prior convictions. See Note, *supra* note 51, 60 Colum. L. Rev. at 1158-59. Moreover, the victim in this case apparently does not desire revenge, since he was willing to agree not to prosecute. See note 2 *supra*.

⁶⁴ Packer, *supra* note 7, 77 Harv. L. Rev. at 1078; Wheeler, *supra* note 53, 24 Stan. L. Rev. at 846. After all, "[t]he true design of all punishments [is] to reform, not to exterminate [or permanently isolate] mankind." N. H. Const. Bill of Rights § 18 (1973), in 1 *The Bill of Rights* 377 (B. Schwartz ed. 1971). See also G. Fletcher, *Rethinking Criminal Law* § 6.3.2, at 416-17 (1978).

e. A Mandatory Life Sentence that Is Not Restricted in the Nature of the Offenses for Which It Is Imposed Serves No Coherent Policy Because It Is So Severe that Judges, Prosecutors, and Juries Restrict Enforcement of the Statute Requiring Its Imposition.

Habitual offender statutes, especially those like article 63 that by their terms apply indiscriminately irrespective of the nature of the underlying offenses, almost by definition advance no coherent policy,⁶⁵ for several reasons. First, as revealed by studies in more than a dozen states and in other countries,⁶⁶ recidivist statutes are seldom used by judges, who consider them too harsh and invariably fashion cumbersome

⁶⁵ See N. Morris, *Towards Principled Sentencing*, 37 Md. L. Rev. 267, 279 (1977) ("[I]legislation [providing for mandatory minimum sentences] is unprincipled and morally insensible: it cannot encompass the factual and moral distinctions between crimes essential to a just and rational sentencing policy"); compare *Furman*, 408 U.S. at 402-03 (Burger, C.J., dissenting) (it is "widely accepted that mandatory sentences do not best serve [legitimate penal purposes]").

⁶⁶ Grosman, *supra* note 25, 9 Crim. L.Q. at 104; Monograph, *supra* note 35, 23 Can. B. Rev. at 658-59, 661-663-64; see Williams, *supra* note 13, 10 Crim. L. Rev. at 733. See generally Brown, *West Virginia Habitual Criminal Law*, 59 W. Va. L. Rev. 30, 37-42 (1956); Tappan, *Habitual Offender Laws in the United States* 13 Fed. Prob. 28, 29-31 (Mar. 1949); Note, *Strict or Liberal Construction of Penal Statutes*, 48 Harv. L. Rev. 748, 750 (1935).

rules to restrict application of such laws.⁶⁷ Due partly to such artificial judicial constructs, habitual offender laws neither measurably deter nor isolate most of those covered by a literal reading of the statute.⁶⁸

⁶⁷ Monograph, *supra* note 35, 23 Can. B. Rev. at 661-63; Note, *supra* note 35, 48 Colum. L. Rev. at 249-53. In the 1920's, when New York prosecutors heavily used that State's recidivist provision, which then mandated a life sentence upon third conviction for any felony, judges openly defied the Legislature by using strained interpretations to circumvent the statute. Finally, the Legislature relented and revised the law to give courts discretion. Similar criticisms convinced lawmakers in other states to do likewise. Monograph, *supra* note 35, 23 Can. B. Rev. at 660-664; Note, *supra* note 35, 48 Colum. L. Rev. at 238-39.

Texas judges have also interpreted article 63 and its successor, section 12.42(d), strictly. See, e.g., *Tyra*, 534 S.W.2d at 697-98 (no enhancement under article 63 unless State proves each succeeding conviction was subsequent to both commission of and conviction for immediately preceding offense); *Carvajal v. State*, 529 S.W.2d 517, 521 (Tex. Crim. App. 1975), *cert. denied*, 424 U.S. 926 (1976) (prior convictions cannot be used more than once to enhance punishment under section 12.42(d)); *Cain v. State*, 468 S.W.2d 856, 858-59 (Tex. Crim. App. 1971) (to prove prior felonies, mere introduction of certified copies of prior judgments and sentences are insufficient to show identity); *Doby v. State*, 454 S.W.2d 411, 413 (Tex. Crim. App. 1970) (prior conviction for capital offense cannot be used for enhancement under article 63); *Ex parte Scafe*, 334 S.W.2d 170, 171 (Tex. Crim. App. 1960) (no enhancement unless both prior convictions were for acts illegal in Texas); *Cromeans v. State*, 268 S.W.2d 133, 135 (Tex. Crim. App. 1954) (no enhancement if defendant received suspended sentence for either of two prior convictions).

⁶⁸ Note, *supra* note 35, 48 Colum. L. Rev. at 238.

Second, studies indicate clearly that prosecutors nullify recidivist statutes by plea bargaining.⁶⁹ This may place undue pressure on the innocent to plead guilty⁷⁰ and often results in both private negotiations not subject to meaningful court review for fairness⁷¹ and a sentence related to neither the specific facts of the case, the defendant's rehabilitative needs, nor the societal interest in vigorous prosecution.⁷² The effect

⁶⁹ Klein, *supra* note 25, 15 Crim. L.Q. at 426, 429; see Mewett, *Habitual Criminal Legislation Under the Criminal Code*, 39 Can. B. Rev. 43, 44 (1961); Monograph, *supra* note 35, 23 Can. B. Rev. at 664. Texas prosecutors commonly plea bargain in burglary, robbery, and theft cases, dropping the habitual count in return for a guilty plea. Ferguson, *The Law of Recidivism in Texas*, 13 McGill L.J. 663 n.4 (1967); Johnson, *supra* note 46, 9 Hous. L. Rev. at 969.

⁷⁰ Accord, Langbein, *Torture and Plea Bargaining*, 46 U. Chi. L. Rev. 3, 13 n.24 (1978) (arguing that to determine whether a potentially harsh sentence can coerce guilty pleas from the innocent, one need only imagine "a differential so great (e.g., death versus a fifty-cent fine) that any reasonable defendant would waive the strongest defenses"); *id.* at 16.

⁷¹ Johnson, *supra* note 46, 9 Hous. L. Rev. at 980. See generally Langbein, *supra* note 70, 46 U. Chi. L. Rev. at 18 (warning against concentration in the prosecutor's hands of the accusatory, adjudicatory, and sanctional phases of criminal procedure).

⁷² *Id.* at 978; Note, 24 Baylor L. Rev. 153, 156 (1972); see Comment, *supra* note 15, 16 Am. Crim. L. Rev. at 295, 305 & n.132. For example, prosecutors often choose to ignore non-forum state convictions for enhancement to avoid cumbersome evidentiary requirements. Brown *supra* note 50, 59 W. Va. L. Rev. at 46; compare note 67 *supra*.

of the statute and its application depend on each prosecutor's belief in the soundness of the recidivist statute in general or as to a particular defendant, with radically uneven enforcement among jurisdictions.⁷³

Finally, as the minimum sentence imposed by a habitual offender statute increases, historically the incidence of jury nullifications has also risen.⁷⁴

Thus, the more severe the recidivist sentence, the greater the incidence of nullification by individual judges, prosecutors, and jurors. This commensurately

⁷³ Mewett, *supra* note 69, 39 Can. B. Rev. at 44-45; compare Ferguson, *supra* note 69, 13 McGill L.J. at 663 n.1. Several studies and reported cases indicate that prosecutors rarely invoke recidivist statutes. Comment, *supra* note 15, 16 Am. Crim. L. Rev. at 277 n.4.

One can reasonably surmise that the weaker the case, the greater the incentive for the prosecutor to press plea bargaining. *Accord*, Johnson, *supra* note 46, 9 Hous. L. Rev. at 979; see Note, *supra* note 72, 24 Baylor L. Rev. at 156; cf. *Gregg*, 428 U.S. at 225 (White J. concurring) (in deciding whether to request the death penalty, prosecutors are motivated primarily by the strength of their cases).

⁷⁴ Monograph, *supra* note 35, 23 Can. B. Rev. at 661; Wheeler, *supra* note 53, 24 Stan. L. Rev. at 850; Note, *supra* note 35, 48 Colum. L. Rev. at 250-51. But cf. text accompanying note 77 *infra* (jury cannot be informed of punishment that would be imposed under old article 63 or new section 12.42(d)). See also *Bordenkircher*, 434 U.S. at 369 n.2 (Blackmun, Brennan & Marshall, JJ., dissenting).

increases the incidence of potentially arbitrary variations in application standards⁷⁵ and shatters any illusions that habitual offender statutes, especially those mandating life imprisonment for a fixed number of crimes that include petty property offenses, contribute constructively to any legitimate penal objective.⁷⁶

3. The Mandatory Nature of the Texas Statute Deprived Rummel of Any Opportunity to Present Evidence of Mitigating Circumstances at the Punishment Stage of the Trial.

If a judge or jury had a range of sentencing discretion under the Texas habitual offender statute and the defendant had a fair opportunity to produce mitigating evidence during the punishment phase of trial, a life sentence imposed under such a procedure, reflecting a rejection of the defendant's mitigating evidence by the factfinder, should be virtually immune

⁷⁵ *Accord*, ABA Sentencing Alternatives, *supra* note 32, *id.* § 3.3(d), at 167.

⁷⁶ The Texas Legislature, by amending the laws governing theft to raise from \$50 to \$200 the amount necessary to constitute a felony, *see note 38 supra*, apparently concluded that for a person with two prior felony convictions who commits a theft of less than \$200, life imprisonment serves no critical penological objective.

from attack on Eighth Amendment grounds.⁷⁷ But the mandatory nature of the Texas statute eliminates the opportunity to present mitigating circumstances and occasionally produces incongruous sentences like Rummel's. The only question open during the punishment stage of an article 63 case is whether the State has proved that the defendant committed the two prior felony convictions alleged in the indictment. *See, e.g., Blackwell v. State*, 510 S.W.2d 952, 954-55 (Tex. Crim. App. 1974). Neither the judge nor the parties can inform the jury that an affirmative answer condemns the defendant to an automatic life sentence.⁷⁸

It is now settled law that a mandatory death penalty is impermissible "in all but the rarest kind of capital case."⁷⁹ Despite the unique severity of the death penalty,⁸⁰ the disproportionality rationale employed in capital punishment cases applies equally to

⁷⁷ *But see Davis v. Davis*, No. 77-1782 (4th Cir., June 29, 1979) (en banc), *aff'd* *Davis v. Zahradnick*, 432 F. Supp. 444 (W.D. Va. 1977) (ruling unconstitutionally excessive a jury-assessed 40-year sentence and \$20,000 fine for possession and distribution of 9 ounces of marijuana).

⁷⁸ *Bevill v. State*, 573 S.W.2d 781, 783-84 (Tex. Crim. App. 1978) (en banc).

⁷⁹ *Lockett v. Ohio*, 438 U.S. 586, 604 n.11 (1978) (reserving opinion with respect to murder by a person serving a life term).

⁸⁰ Admittedly, the Court has carefully distinguished capital and non-capital cases. *E.g., id.* at 2964-65 & n.11. But non-capital cases rarely raise the mandatory-discretionary inquiry in a setting as extreme as this case. Moreover, Rummel asks not that

this case and argues that the Court should reject as cruel and unusual the mandatory life sentence Rummel received for his three petty property offenses. *See also Rummel*, 587 F.2d at 664-70 (dissenting opinion) (discussing *Ex Post Facto* cases).

Article 63 is a statute lacking both compassion and the possibility of compassion. When applied to offenses as trivial as those for which Rummel was convicted, it serves no function but a mindless, vindictive retribution that has no place in a civilized society.

4. Subjectivity, Inherent in Many Constitutional Principles, Has a Negligible Effect on the Outcome of this Case and Is No Justification for Refusing to Examine Potentially Unconstitutional Conduct.

The en banc court, apparently concerned about the inevitably subjective nature of the *Coker* test, criticized Rummel's characterization of his offenses as trivial, suggested that his analysis gives no indication of a usable standard but the amount of money involved, and predicted a flood of litigation taking this Court down the "slippery slope." *See id.* at 662 & n.29 (A. 40-41 & n.29); *accord, Rummel*, 568 F.2d at 1201-02 & n.3 (A. 21-23 & n.3) (panel dissenting opinion).

his sentence be invalidated solely because it was imposed automatically, but only that the mandatory nature of his punishment be viewed as an additional factor tipping the scales towards disproportionality.

Admittedly, like many other constitutional standards, no Eighth Amendment analysis can be wholly objective, given the nature of the issue and its relation to evolving standards of decency. *See, e.g., note 38 supra.* Accordingly, criteria selected to evaluate proportionality should be viewed as limiting judicial subjectivity, not replacing it. The critical issue is not whether a proportionality determination is subjective, but rather whether proportionality is a sufficiently important objective that its attainment justifies some sacrifice in objectivity. To this issue, the Court has clearly answered in the affirmative. *See, e.g., text accompanying notes 9-11 supra.*

The standard articulated in *Coker* is a workable one, as other federal and state courts that have employed a similar analysis for years in reviewing lengthy sentences can testify.⁸¹ The test turns on po-

⁸¹ *See, e.g., In re Lynch*, 105 Cal. Rptr. 217, 503 P.2d 921, 929 & n.13, 930-31, 933 (1973) (en banc) (discussing cases in Alaska, California, New Jersey, New York, North Carolina, Oregon, South Carolina, Washington and West Virginia); *State v. Freeman*, 223 Kan. 362, 574 P.2d 950, 956 (1978); *People v. Broadie*, 37 N.Y.2d 100, 332 N.E.2d 338 (1975); *cf. D. Fellman, The Defendant's Rights Today* 405-06 (1976 ed.) (describing cases in numerous states).

Although the en banc court pointed to the difficulty of distinguishing between thousands of combinations of offenses, 587 F.2d at 662 n.29 (A. 41 n.29), neither the Fifth nor Fourth Circuits have had difficulty drawing the line. *See, e.g., Chapman v. Estelle*, 593 F.2d 687, 688 n.1 (5th Cir. 1979) (*Thornberry, Clark*

tential violence and societal harm, not a dollar sign; if Rummel had taken the same amount by violent means or caused grievous injury to a victim,⁸² he

& Roney, J.J.) (two burglaries and forgery; “[e]ven the original panel in *Rummel* . . . would likely reject [the Eighth Amendment] claim”); *Griffin v. Warden*, 517 F.2d 756 (4th Cir.), cert. denied, 423 U.S. 990 (1975) (grand larceny, breaking and entering grocery store, and burglary of residence; held not disproportionate).

⁸² To characterize crimes involving potential violence as significantly more serious than nonviolent property offenses can be justified on the ground that, almost without exception, crimes involving great danger to the physical well-being of others carry the severest sentences. *Wheeler*, *supra* note 53, 24 Stan. L. Rev. at 862 & n.107; see, e.g., *Comment*, *supra* note 50, 45 Texas L. Rev. at 482-83, 491-93 (statistically demonstrating such a relationship between violence and assessed term of incarceration in Texas, except for a wide disparity between the expected sentence upon conviction for a third nonviolent property felony if not sentenced under article 63—approximately ten years—and the life sentence assessed under that statute); compare Table 2 (C. 22-27), which lists all felonies under Texas law, by degree, demonstrating that only violent crimes are classified as first-degree felonies and that few nonviolent crimes are classified as second-degree felonies.

Even the so-called “victimless” crime of narcotics use, according to experts, may induce a user to commit violent acts and lead ultimately to a disintegration of the social order. E.g., *Snyder*, *Catecholamines in the Brain as Mediators of Amphetamine Psychosis*, 27 Archives of Gen. Psychiatry 169, 171 (Aug. 1972) (discussing amphetamine and cocaine psychosis). See generally *Carmona*, 576 F.2d at 411-12 (discussing the threat to society posed by narcotics use); *Broadie*, 332 N.E.2d at 342-43 (marijuana).

would likely have forfeited any constitutional objection to his sentence.

Moreover, under the *Coker* rationale, the requirement that the sentence be *grossly* disproportionate to the offenses rather than merely disproportionate circumscribes this inevitable subjectivity by drastically reducing the number of cases in which the punishment will appear even arguably excessive. In this case, where Rummel’s mandatory life sentence is grossly excessive by any measure, subjectivity is a false issue.

In any event, however, criticism that the proportionality test (and, in particular, its nature-of-the-offense element) is subjective can be answered only by acknowledging that observation’s partial accuracy, demanding adherence to criteria that minimize subjectivity, and recognizing that imperfections in the best available test do not justify “abdication of fundamental responsibility in the guise of judicial restraint.” *Rummel*, 568 F.2d at 1202 (A. 22) (panel dissenting opinion).⁸³ As the *Weems* court recognized, when the legislature’s exercise of its “legislative power to define crimes and fix their punishment . . . encounters in its exercise a constitutional prohibition[,] . . . not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked.” 217

⁸³ The legitimate concern that judges not substitute their own “conceptions of wisdom and propriety,” *Rummel*, 568 F.2d at 1202 (A. 22) (dissenting opinion), does not preclude the courts from assessing the gravity of the crimes. The court’s ability to

U.S. at 378; *accord*, *Furman*, 408 U.S. at 313-14 (White, J., concurring).

C. The Rational Basis Test Imposed by the En Banc Court Has No Place in an Eighth Amendment Proportionality Analysis.

The en banc court demanded that a punishment, to be unconstitutionally disproportionate, have no rational basis. 587 F.2d at 655-56, 661-62 (A 30-31, 40-41). In doing so, it effectively supplanted the disproportionality test of *Coker* with the rational basis

review statutory punishments would be meaningless without such judgments. As Justice Brennan observed in *Furman*:

Judicial enforcement of the [Cruel and Unusual Punishment] Clause, then, cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes.

That is precisely the reason the Clause appears in the Bill of Rights.

408 U.S. at 269 (concurring opinion).

Nor need this Court fear a flood of litigation. No jurisdiction in which courts have reversed sentences based on a proportionality rationale has experienced such a problem. Cf. Comment, *supra* note 15, 16 Am. Crim. L. Rev. at 285 & n.70 (citing the 20 lower court cases to date in 17 different jurisdictions holding sentences grossly excessive).

Moreover, if the Court agrees that the line should be drawn at three nonviolent property offenses, few cases will qualify. Taking the number of reported opinions in the Texas Court of Criminal Appeals as an approximation, not many more than 380 inmates have received life sentences as habitual criminals since 1965, see

test.⁸⁴ The burden the en banc court thus imposed is an impossible one to discharge, since the opinion refuses to examine the nature of the underlying offenses, *see id.* at 659 (A. 36); pt. Bla(ii), at 29-30 *supra*, and it is inappropriate for Eighth Amendment analysis, since even the most reprehensible torture has some rational basis as retribution or deterrent.⁸⁵ Moreover, the "rational basis" standard has no support in this Court's Eighth Amendment decisions, which require at most that the courts give deference to the legislative judgment. *See, e.g.*, *Gregg*, 428 U.S. at 175 (Stewart, Powell & Stevens, JJ., plurality opinion).

Table 1 (C. 1-21), and even if a favorable Eighth Amendment decision in this case applies retroactively, *cf.* *Stovall v. Denno*, 388 U.S. 293, 297 (1967), only a handful of those can point to three nonviolent property offenses with no potential violence as the basis for their sentence, *see Table 1 (C. 1-21)*, listing every reported habitual offender case in the Texas Court of Criminal Appeals since 1965, grouping first all cases involving prisoners with three or more convictions for violent crimes, in descending order approximately according to degree of potential violence, listing last (C. 21) those cases—only 8 of 380 cases (.02105 or 2.1%)—in which the prisoner committed only nonviolent property crimes). There will be no flood, just a trickle. This further highlights the gross injustice that Rummel's sentence represents.

⁸⁴ See Radin, *supra* note 8, 126 U. Pa. L. Rev. at 1001-09.

⁸⁵ *Id.* at 1011.

D. Rummel Has Not Procedurally Defaulted the Right to Challenge His Punishment as Cruel and Unusual by Failing to Object on that Basis at the Punishment Phase of His Trial.

For the *first time* in this habeas proceeding,⁸⁶ the State argued in the *en banc* court⁸⁷ and again in this Court⁸⁸ that because Rummel failed to object to his sentence during the punishment stage of his trial (*see* R. 118-20, 243-45), the combination of the federal "procedural default doctrine" and the Texas "contemporaneous objection rule" bars Rummel from objecting in a habeas corpus petition that his punishment is unconstitutionally cruel and unusual. This argument must fail because (1) the State waived it by not raising it below and (2) Texas law permits a constitutional objection of this nature to be made at any time.

⁸⁶ The State did not raise this issue in proceedings in either the state courts (*see* R. 40-45), the federal district court (*see* R. 12-21), or the Fifth Circuit panel, *see Brief of Appellee, Rummel v. Estelle*, 568 F.2d 1193 (5th Cir. 1978); *Appellee's Responsive Supplemental Brief*, 568 F.2d 1193 (5th Cir. 1978).

⁸⁷ *Appellee's Second Supplemental Brief* at 36-40, *Rummel v. Estelle*, 587 F.2d 651 (5th Cir. 1978) (*en banc*).

⁸⁸ *Respondent's Brief in Opposition, Rummel v. Estelle*, No. 78-6386, at 8-9, *cert. granted*, 47 U.S.L.W. 3760 (U.S. May 21, 1979).

1. The State Waived Its Right to Argue Procedural Default by Not Raising the Argument in the Lower Court.

Rule 8(c) of the Federal Rules of Civil Procedure, which applies in habeas corpus cases,⁸⁹ requires that all affirmative defenses be alleged in responsive trial pleadings: "In pleading to a preceding pleading, a party shall set forth affirmatively . . . waiver, and any other matter constituting an avoidance or affirmative defense." Fed. R. Civ. P. 8(c). The lower courts unanimously agree that failure to plead an affirmative defense waives it⁹⁰ and that it cannot be raised for the first time on appeal.⁹¹ Having failed to raise the procedural default issue below, the State cannot raise it now.

2. The Texas Contemporaneous-Objection Rule Does Not Apply to Rummel's Objection to His Sentence.

In support of its position that Rummel waived his right to object to the life sentence by failing to object

⁸⁹ Rule 11, Rules Governing Section 2254 Causes; 17 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction* ch. 12, § 4268, at 694 (1978).

⁹⁰ See, e.g., *Funding Systems Leasing Corp. v. Pugh*, 530 F.2d 91, 96 (5th Cir. 1976); *Phoenix Assurance Co. v. Appleton City*, 296 F.2d 787, 792 (8th Cir. 1961).

⁹¹ E.g., *Atlas Assurance Co. v. Standard Brick & Title Corp.*, 264 F.2d 440, 443 (7th Cir. 1959).

at trial, the State weakly cites 5 Tex. Jur. 2d, *Appeal and Error—Criminal Cases* § 22, at 42-43 (1959), cited in Respondent's Brief in Opposition at 8, *Rummel v. Estelle*, No. 78-6386, cert. granted, 47 U.S.L.W. 3760 (U.S. May 21, 1979), but fails to cite the next section, *id.* § 23, which provides that failure to raise a fundamental error at trial does not preclude raising it on appeal. According to this authority, among those fundamental errors that can be raised at any time is "an objection that the statute under which the defendant was convicted is violative of the constitution." *Id.* at 44 (citing *Barnes v. State*, 170 S.W. 548, 550 (Tex. Crim. App. 1914), cited approvingly in *Gann v. Keith*, 253 S.W.2d 413, 417 (Tex. 1952)). On this basis, the en banc court rejected the State's argument. 587 F.2d at 653-54 (A. 27). Moreover, Texas courts do not find waiver when the defendant fails to object on a ground "not yet established as a defect of constitutional magnitude," *Ex Parte Sanders*, ____ S.W.2d ___, No. 60,221, Slip Op. at ____ (Tex. Crim. App., Mar. 14, 1979); *Ex parte Casarez*, 508 S.W.2d 620, 622 (Tex. Crim. App. 1974), recognized as part of the general rule that waiver of fundamental constitutional rights must be clear, *see Sanders*, Slip Op. at ____.⁹²

⁹² Cf. *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976) (terminating stay of execution based on "knowing and intelligent waiver of any and all federal rights"); *id.* at 1014-15 (Burger, C.J., & Powell, J., concurring) (same); *id.* at 1018 (White, Brennan & Marshall, JJ., dissenting) (arguing that objection to a punishment on Eighth Amendment grounds cannot be waived); *id.* at 1019 (Marshall, J., dissenting) (same).

That Texas courts have created such an exception is not surprising. The contemporaneous objection rule was devised to prevent an accused from seeking a new trial if unsuccessful in the current one by raising for the first time on appeal correctible trial errors.⁹³ This rationale explains why *every* case cited by the State in which the rule was applied, *see cases cited in Respondent's Brief in Opposition at 8, Rummel v. Estelle*, No. 78-6386, cert. granted, 47 U.S.L.W. 3760 (U.S. May 21, 1979), concerns objections to evidentiary or other matters that can be corrected by instruction or mistrial. Since such a policy has no application to Rummel's claim, the contemporaneous objection rule does not apply here.

Even if it did apply, the two grounds justifying an exception to the procedural default doctrine recognized in *Francis v. Henderson*, 425 U.S. 536, 542

⁹³ *Mason v. State*, 459 S.W.2d 855, 858 (Tex. Crim. App. 1970); *see Ex parte Bagley*, 509 S.W.2d 332, 334 (Tex. Crim. App. 1974). As described by Justice Powell in *Estelle v. Williams*, 425 U.S. 501 (1976), one of the "situations in which a conviction should be left standing despite the claimed infringement of a constitutional right . . . arises when a defendant has made an 'inexcusable procedural default' in failing to object at a time when a substantive right could have been protected." *Id.* at 513-14 (concurring opinion) (emphasis added); *see Wainright v. Sykes*, 433 U.S. 72, 88-90 (1976) (the contemporaneous-objection rule prevents "sandbagging" by defense lawyers gambling on a not-guilty verdict in state court while preserving their constitutional claims for the federal habeas court).

(1976); *accord, Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1976)—“good cause” and “actual prejudice”—would protect Rummel. “Good cause” is present if the defendant can show that no reasonable person would have freely elected not to object.⁹⁴ Surely no one can dispute that Rummel had no reasonable expectation of prevailing in state court on his Eighth Amendment claim, given the long line of Texas cases upholding the habitual offender provision from Eighth Amendment attack, as pointed out by the en banc court below, 587 F.2d at 653 & n.2 (A. 27 & n.2), and further confirmed in the summary rejection by the Texas Court of Criminal Appeals (R. 31) of Rummel’s appeal from the denial by the lower state court of his application for habeas corpus relief on the same issue (R. 51-54). Moreover, Rummel obviously had no tactical reason for withholding his objection, since (1) he did not raise the issue in his direct appeal, *see* 509 S.W.2d 630, and (2) he would have received no greater relief from a successful appeal than from a successful trial court ruling.

“Actual prejudice” is likewise easily demonstrated, since Rummel is serving a significantly longer sentence than he would have if the trial judge had ruled the sentence excessive.

⁹⁴ According to one authority, “a defendant may avoid [procedural default] by showing not only that he did not ‘waive’ the right by free and intelligent choice but also that no reasonable person would, under the circumstances, have done so.” Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 Texas L. Rev. 193, 211 (1977).

E. The Prosecutor’s Discretion to Indict Habitual Offenders Is Not an Issue in this Case.

The State claims that a ruling that Rummel’s sentence is unconstitutionally excessive requires holding that the prosecutor abused his discretion in the charging process, Respondent’s Brief in Opposition at 12, *Rummel v. Estelle*, No. 78-6386, cert. granted, 47 U.S.L.W. 3760 (U.S. May 21, 1979), and that the State should be given the opportunity to demonstrate all factors bearing on the prosecutor’s original decision, *id.* at 13. But Rummel challenges the Texas Legislature’s right to confer the power to punish a three-time petty property offender under the habitual offender statute, not the prosecutor’s decision to exercise that power,⁹⁵ as even the en banc court below apparently recognized, *see* 587 F.2d at 660 n.24 (A. 37 n.24). Moreover, the factors upon which the State requests an opportunity to justify the prosecutor’s exercise of discretion are matters that were *not* a part of the

⁹⁵ In upholding as constitutional a prosecutor’s threat to invoke a state recidivist law in his attempt to obtain a guilty plea, the Court in *Bordenkircher* based its decision on the need for broad prosecutorial discretion in plea bargaining. See 434 U.S. at 361-65. This case poses no threat to the exercise of that discretion. Rummel seeks merely to remove one weapon from the prosecutor’s arsenal in a limited number of cases; prosecutorial discretion to threaten use of available punishments would be unaffected.

original record but were first raised in an eleventh-hour *amicus curiae* brief filed shortly before oral argument in the Fifth Circuit en banc. The State's attempt to shift the issue from legislative power to prosecutorial discretion and to rely on matters outside the record exposes the weakness of the State's position.

F. If the Court Agrees that Rummel's Life Sentence Is Unconstitutionally Excessive, Rummel Is Entitled to Immediate Release.

Under Texas law, if an appellate court determines that reversible error occurred in the punishment phase of a trial, then the proper remedy depends on whether the penalty was assessed by judge or jury. If determined by a judge, the case must be remanded to the trial court for proper resentencing. *Bullard v. State*, 548 S.W.2d 13, 18 & cases cited therein (Tex. Crim. App. 1977). If assessed by the jury, the appellate court cannot order a new trial on the punishment issue alone or a new punishment hearing before a different jury, *id.*, but must remand for a new trial.⁹⁶

⁹⁶ E.g., *Ex parte Ropollo*, 558 S.W.2d 869, 871 (Tex. Crim. App. 1977); *Ellison v. State*, 432 S.W.2d 955, 957 (Tex. Crim. App. 1968) (since Texas statutes give a criminal defendant who requests sentencing by a jury the right to be sentenced by the same jury that convicted him, a defendant whose sentence is invalidated on appeal cannot be resentenced but must be granted a new trial).

In this case, Rummel requested that his punishment be assessed by the jury (*see R. 119, 226, 241-43*) pursuant to 1967 Tex. Gen. Laws, ch. 659, § 22, art. 37.07, § 2(b)(3), at 1739; *compare Tex. Code Crim. Proc. Ann. art. 37.07, § 2(b)(3)* (Vernon Supp. 1978), which provides that a judge assesses punishment after a guilty verdict, unless the defendant requests that the sentence be assessed by the jury. With the punishment fixed by law under article 63, the jury merely verified the existence of the two prior convictions (*see R. 115-17, 119, 239-41*).

Thus, a ruling for Rummel on the Eighth Amendment issue would require a new trial. And by the terms of the 1974 Texas Penal Code, 1973 Tex. Gen. Laws, C. 399, § 6(c), at 996, Tex. Penal Code Ann., Savings Provisions, § 6(c) (Vernon 1974), if again found guilty Rummel could elect to have his punishment assessed under that Penal Code and thus face a maximum one-year sentence, *see note 38 supra*, which he has long since served, thus entitling him to immediate release.⁹⁷

⁹⁷ Compare, e.g., *Ex parte Swinney*, 499 S.W.2d 101, 104 (Tex. Crim. App. 1973) (if maximum possible sentence upon retrial is less than time already served, prisoner is entitled to immediate release).

CONCLUSION

The judgment of the en banc court of appeals should be reversed and Rummel released from confinement.

Respectfully submitted,

/s/ SCOTT J. ATLAS
Scott J. Atlas
VINSON & ELKINS
2100 First City National
Bank Building
Houston, Texas 77002
(713) 651-2024

*Court-appointed Counsel
for Petitioner*

Of Counsel

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

Supreme Court, U.S.
FILED

AUG 7 1979

WILLIAM JAMES RUMMEL, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO. 78-6386

WILLIAM JAMES RUMMEL,
Petitioner,

v.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARTS FOR THE PETITIONER

SCOTT J. ATLAS
Vinson & Elkins
2100 First City National
Bank Building
Houston, Texas 77002

Counsel for Petitioner

Of Counsel

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

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DESCRIPTION OF TABLESTABLE 1

This Table, which lists every reported case decided between January 1, 1965, and June 30, 1979, in the Texas Court of Criminal Appeals in which a prisoner received a life sentence under either article 63 of the 1925 Penal Code or section 12.42(d) of the 1974 Penal Code, with cases involving the most serious offenses listed first. The methodology and abbreviations used in Table 1 are explained at footnote * of that Table (C. 1).

TABLE 2

This Table lists all felony offenses specified in the 1974 Penal Code and the Controlled Substances Act, by degree of felony.

TABLE 3

This Table lists in chronological order for each state and territory and the Federal Government almost all habitual offender legislation in effect since 1776. The following is a description of each column heading and the terminology used in each column.

(1) The state name is listed only once, except that an abbreviation for the state appears at the top of each succeeding page.

(2) The "Effective Date" is the date that the statute went into effect. If an effective date was unavailable, the date approved was used. Before 1900, only the year appears; after 1900, both the day and month are included.

(3) In the "Cite" column is a citation of (a) the year in which each statute was enacted, followed by the word "Acts," and (b) citation of the relevant session law in which the statute was first published. No code cites appear in this table unless the statute did not appear in the session laws, in which event the Penal Code ("P.C.") cite is used.

Many habitual offender statutes contain several provisions and apply with varying degrees of harshness to different combinations and numbers of offenses. Each such provision is listed with the citation to the statute, in ascending order, according first to the number of prior offenses required and then according to the severity of the punishment provided. The date of enactment and the session law citation appear only once, adjacent to the first statutory provision listed, but each citation refers to every provision listed between that cite and the citation to the next statute.

(4) The "Present Offense" column describes the type of offense that must be committed before an enhanced punishment applies. When the statute applies to any offense punishable by imprisonment, the term "prison offense" is used. If the statute designates the offenses to which an enhanced punishment applies, the words "specified felony" or "specified offense" are used. If the statute applies to any felony or any prison offense, only the words "felony" or "prison offense" appear.

(5) In the "# of Priors" column is a number corresponding to the number of prior offenses that an accused must have committed before the present offense can be punished by an enhanced sentence under the relevant habitual offender statute.

(6) In the "Previous Offenses" column is a description of the type of offenses that an accused must have committed previously before the punishment for the most recent offense can be enhanced. The same terminology used in the "Present Offense" column is used in the "Previous Offenses" column.

(7) In the "Previous Sentence" column appears any minimum sentence that must have been served for one or more of the prior offenses before the habitual offender statute applies. If the statute requires only that time have been spent in prison, without a specified minimum time, the designation "Prison Term" is used.

(8) The "Mandatory Minimum" and "Discretionary Maximum" columns contain information regarding the punishment that a judge must impose on a habitual offender and the discretionary punishment that a judge or jury may assess such an offender. For example, if the statute mandates assessment of the maximum sentence for the third offense and permits a sentence for any term of years, including life imprisonment, then the word "Maximum" will appear in the "Mandatory Minimum" column and "Life" will appear in the "Discretionary Maximum" column.

Table 3 includes every habitual offender statute dealing with felonies or "prison offenses." I excluded only those statutes relating to (1) nothing but misdemeanors or larceny offenses for both present and past offenses, unless the punishment exceeded five years, and (2) statutes dealing with certain trivial offenses such as moving vehicle and liquor law violations, unless the punishment exceeded five years. A statute that required commission of either a felony or a prison offense was automatically included, even if it

also required commission of either a misdemeanor or a larceny offense or carried a punishment of five years or less.

TABLE 4

This Table lists the statutes currently in effect in each state and territory. It is identical in column information to Table 3 except that the session law cite has been replaced by a citation to the current code.

TABLE 5

This Table lists those statutes contained in Table 3 in which a state has ever enacted and later repealed a habitual offender statute mandating a life sentence upon commission of a specified number of offenses, without requiring that one of the offenses be either "semi-violent" (*i.e.*, potentially violent, such as burglary) or violent. The "Effective and End Dates" column lists the statute's effective date and the date on which the statute was replaced by a new enactment. The "# of Years" column lists the number of years during which the statute (or combination of statutes within a particular state) was in effect before being replaced by a new statute.

TABLE 6

Beginning with 1900 and at each five-year period thereafter, this chart lists the states with habitual offender statutes, first by the length of sentence and then by the type and number of triggering offenses. Length of sentence is divided into four categories: (1) mandatory life (Table 6A), (2) discretionary life (Table 6B), (3) mandatory sentence: less than life (Table 6C), and (4) discretionary sentence: less than life (Table 6D). A fifth category, "no

habitual offender statute" (Table 6E) completes the categories. Within each punishment length category, three types of triggering offense requirements are used: (1) when the statute applies to any offense (including statutes that can be triggered by specified nonviolent offenses); (2) when the statute cannot be applied unless at least one violent or semi-violent offense (including a narcotics offense) has been committed; (3) some other requirement, *i.e.*, commission of "similar felonies" or felonies of any class or degree where the type of offense falling within that class or degree of felony was not known.

The following abbreviations were used:

"a" = any

"nv" = nonviolent offense

"sv" = semi-violent offense

"v" = violent offense

"o" = other requirement

"j" = the statute requires that jail time have been served for one or more of the previous offenses

"m" = enhanced punishment does not apply unless the current offense is punishable by a minimum or maximum term of a specified number of years,

"s" = the statute does not apply unless the judge or jury sentences the defendant to a term of imprisonment for the current offense,

"t" = the statute does not apply unless the previous offense or offenses were committed within less than a specified number of years before commission of the most recent offense.

The following rules were employed in categorizing statutes:

(1) Any statute mandating a life sentence upon conviction of a specified number of felonies when the most recent felony is punishable by life imprisonment is not treated as a separate statute if the same jurisdiction also mandates imposition of the maximum sentence for the most recent offense upon conviction of a smaller number of felonies. (2) An offense punishable by life imprisonment is treated as a violent offense. (3) A sentence of fifty years or more is treated as a life sentence. (4) An offense punishable by a prison term exceeding ten years is treated as a "semi-violent offense" unless the offenses are otherwise known. (5) Class 1 or A or first degree felonies are treated as violent offenses. (6) A mandatory sentence that the judge has discretionary power to reduce is treated as a discretionary sentence.

TABLE 7

These Tables categorize and total the jurisdictions listed in Table 6. As in Table 6, the statutes are categorized according to the length of sentence, *i.e.*, mandatory life (Table 7A), discretionary life (Table 7B), mandatory sentence: less than life (Table 7C), and discretionary sentence: less than life (Table 7D). In each of these charts, the number of jurisdictions with statutes applying to any one of the following three categories of triggering offenses are listed: (1) any offense, or several designated offenses that included nonviolent offenses, (2) at least one semi-violent or violent offense, and (3) some other offense requirements. Included in each triggering offense category is the total number of offenses necessary to trigger the habitual offender statute. Any jurisdictions requiring more than four offenses were included in the column labeled "4+."

Table 7E summarizes the information contained in Tables 7A-D. Table 7F compares the number of jurisdictions each five years since 1900 with mandatory sentences of any length and those with discretionary sentences of any length.

As reflected in Table 3, many states increase the length of sentence as the number of prior convictions increase, *e.g.*, one length sentence for a second conviction, a longer sentence for a third conviction, etc. Within each state, each sentence listed in Table 3 was treated in Table 7 as a separate statute; thus, in a given year, the number of statutes listed in Table 7 usually exceeds the number of states and territories represented.

Even though Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied as untimely filed, 415 U.S. 938 (1974), prohibited prosecutors from imposing on certain petty felony offenders the life sentence mandated by the West Virginia recidivist statute and even though the Washington Supreme Court has indicated that it might follow Hart if the Washington habitual offender statute were ever applied to someone with three petty property offenses, both states were listed in the "Any Felonies" category on the "Mandatory Life Sentence" chart (Table 7A).

To avoid double counting, the figure in each "Total" column of Table 7 represents the total number of relevant jurisdictions rather than the total number of statutory provisions. When the figures in several columns are added together to obtain a total, if the figures in any two columns for the same year include more than one statutory provision from the same jurisdiction, the total is reduced by the number of duplicate provisions. Thus, the number listed in the

"Total" column represents the total number of different jurisdictions with habitual offender legislation containing a provision falling within the category described in that column. In this manner, a state is not counted more than once merely because it has a habitual offender statute with several provisions that fall within the same category. A state may be counted once in each of several categories, however, if it has enacted habitual offender legislation that falls within more than one category in a given year.

TABLE 8

This Table categorizes and summarizes all current habitual offender legislation, *i.e.*, the statutes listed in Table 5.

HABITUAL OFFENDER CASES
IN THE TEXAS
COURT OF CRIMINAL APPEALS:
1965 - 1979*

I. 3 OR MORE VIOLENT OFFENSES

A. Affirmed on Appeal (3 cases)

Mathis v. State, 471 S.W.2d 396 (1971) (3 assaults with intent to murder, assault with intent to rape)

Roberts v. State, 495 S.W.2d 894 (1973) (robbery by assault, 2 robberies)

Simmons v. State, 456 S.W.2d 66 (1970) (rape by force and threats, 2 aggravated assaults, carrying a pistol, auto theft)

*/ The cases listed in this Table were obtained by programming a Lexis computer to retrieve every reported opinion since 1965 in the Texas Court of Criminal Appeals, the highest state criminal court, citing any one of the following: "art. 63," "article 63," "12.42(d)," and "12.42 (d)." This produced approximately 750 cases, all of which were read and the irrelevant ones discarded, leaving cases involving 380 persons. In 75 of these cases, the appellate court reversed the conviction; the court's disposition is reflected after each citation.

The Lexis data bank contains only cases decided after December 31, 1964. It contains neither unreported cases, cases in which the prisoner did not appeal to the Texas Court of Criminal Appeals, nor cases decided after June 30, 1979. No effort was made to determine the number of cases in these categories, although there is no reason to believe that the percentage of cases in each category would vary significantly if such cases had been included.

In this Table, the first offense listed in parentheses is the most recent offense, *i.e.*, the offense that triggered indictment and conviction under either article 63 or section 12.42(d). For each case in which one or more prior offenses were not named, the designations "+ 1," "+ 2," etc. were used to record the number of unknown offenses indicated in the cited case or cases. For each case in which one or more prior offenses were not listed, the Lexis computer was programmed to obtain every other published opinion issued since 1965 in which a prisoner with the same name had appealed to the Texas Court of Criminal Appeals. Additionally, an attempt was made to find other opinions in the Texas Digest table of cases. All such opinions in which the court described an offense not previously indicated in the first print-out were listed above, and the offenses listed in parentheses were changed accordingly.

Cases listed in this Table are grouped according to the nature and number of offenses, using the following categories: (1) "violent offenses," which include murder, robbery, assault, rape, burglary by assault, armed burglary, escape or aiding escape from prison, any armed offense, and any offense in which assault or other violence or carrying a weapon is an element; (2)

TABLE 1

I. 3 OR MORE VIOLENT OFFENSES (cont.)

B. Reversed on Appeal (1 case)

Montgomery, Ex parte, 571 S.W.2d 182 (1978); Montgomery v. State, 571 S.W.2d 18 (1978) (aggravated assault, aggravated assault with a deadly weapon, making a false statement to a licensed firearm dealer in connection with a firearms purchase, burglary; reversed and remanded for resentencing for either the third offense or as a two-time offender, but not as a three-time habitual offender)

II. 2 VIOLENT OFFENSES, 1 OTHER

A. Affirmed on Appeal (13 cases)

Ashley v. State, 527 S.W.2d 302 (1975) (false imprisonment, sodomy, robbery)

Doby v. State, 454 S.W.2d 411 (1970) (narcotics possession, armed robbery, assault with intent to rob)

Garcia, Ex parte, 560 S.W.2d 948 (1978) (2 possessions of a firearm by a felon + 1)

Hall, Ex parte, 546 S.W.2d 303 (1977) (theft, robbery by assault, murder without malice)

Hardin v. State, 453 S.W.2d 156 (1970); 453 S.W.2d 158 (1970); 471 S.W.2d 60 (1971) (auto theft, robbery by assault, armed robbery)

(footnote continued)

"semi-violent offenses," which include such offenses as burglary (unless it involved assault or intent to commit a violent crime), theft from a person, grand larceny, driving while intoxicated, child desertion, child-molesting offenses, breaking and entering a motor vehicle, and auto theft; (3) "drug offenses," including sale and delivery of any drug and possession of any drug or drug paraphernalia, with cases involving heroin listed first, then cases involving the nonspecific term "narcotics," and finally cases involving marijuana; (4) "sex offenses," which include every sex crime not listed in the violent or semi-violent category; (5) "nonviolent offenses," which include forgery, bad checks, credit card abuse, counterfeiting, petty larceny, petty theft, receiving and concealing stolen property, swindling, and embezzlement; and (6) "unknown offenses," which include every prior offense not specifically named in the cases found. Attempt and accomplice offenses were categorized according to the underlying crimes.

For listing purposes, crime categories were rated according to an arbitrarily selected degree of seriousness, most serious first, in the following order: violent crimes, semi-violent crimes, drug offenses (first, heroin, then "narcotics," and finally, marijuana), sex crimes, and nonviolent offenses. A case was listed in the category of the most "serious" offense committed. For example, a case involving convictions for murder, heroin sale, and theft would be listed in the "1 Violent Offense, at Least 2 Others" category and would not appear in either the "1 Drug Offense, at Least 2 Others" category or the "1 Nonviolent Offense, at Least 2 Others" category.

II. 2 VIOLENT OFFENSES, 1 OTHER (cont.)

Hughes v. State, 455 S.W.3d 303 (1970) (murder, unlawfully carrying a pistol + 2)

Kincheloe v. State, 553 S.W.2d 364 (1977) (murder without malice, burglary, possession of a firearm by a felon)

Lane, Ex parte, 417 S.W.2d 589 (1967) (assault with intent to murder, burglary, assault with intent to murder with malice)

McCarter v. State, 527 S.W.2d 296 (1975) (escape by a felon, assault with intent to commit rape, theft)

Massey, Ex parte, 442 S.W.2d 388 (1969); Massey v. State, 266 S.W.2d 880 (1954) (theft, theft by false pretenses, burglary, burglary of a private home at night, escape from prison, aiding prisoners to escape from prison)

Mena v. State, 504 S.W.2d 410 (1974) (possession of a pistol after being convicted for a violent crime, robbery, burglary)

Smith, Ex parte, 548 S.W.2d 410 (1977) (car theft, armed robbery, aggravated robbery)

Winkle v. State, 506 S.W.2d 891 (1974), cert. denied, 419 U.S. 843 (1974) (2 rapes + 1)

B. Reversed on Appeal (6 cases)

Gutierrez v. State, 555 S.W.2d 457 (1977) (burglary, robbery by assault, escape using a deadly weapon; reversed and remanded for a new trial, with a life sentence still possible)

Ropollo, Ex parte, 558 S.W.2d 869 (1977) (armed robbery, robbery by assault, obtaining narcotics by fraud; reversed and remanded for resentencing, with a life sentence still possible)

Scott, Ex parte, 581 S.W.2d 181 (1979) (burglary with intent to commit theft, 2 robberies; reversed and resentenced as a two-time offender, but not as a three-time habitual offender)

Spiers v. State, 552 S.W.2d 851 (1977) (aggravated assault, assault with intent to murder, burglary; reversed and remanded for resentencing, with a life sentence still possible)

Stewart, Ex parte, No. 59,778 (June 13, 1979) (robbery, robbery by assault + 1; reversed and remanded for a new trial on the third offense and as a two-time offender, but not as a three-time habitual offender)

Wiggins v. State, 539 S.W.2d 142 (1976) (2 robberies, theft; reversed and remanded for a new trial, with a life sentence still possible)

III. 1 VIOLENT OFFENSE, AT LEAST 2 OTHERS

A. Affirmed on Appeal (68 cases)

Allen, Ex parte, 452 S.W.2d 472 (1970) (2 thefts, robbery by assault)

III. 1 VIOLENT OFFENSE, AT LEAST 2 OTHERS (cont.)

Alston v. State, 458 S.W.2d 820 (1970) (assault with intent to murder with malice + 2)

Anderson v. State, 495 S.W.2d 896 (1973); 351 S.W.2d 232 (1961) (theft, assault with intent to rape + 1)

Brooks v. State, 567 S.W.2d 2 (1978); 342 S.W.2d 439 (1960) (forgery, rape + 1)

Ash, Ex parte, 514 S.W.2d 762 (1974) (burglary, robbery by assault, theft)

Ballard v. State, 487 S.W.2d 724 (1972) (robbery by assault + 2)

Banks v. State, 471 S.W.2d 811 (1971) (robbery by assault + 2)

Barnwell v. State, 504 S.W.2d 877 (1974) (indecent exposure to a child under 16 years old, theft, robbery)

Bell v. State, 501 S.W.2d 137 (1973) (assault with intent to murder a policeman + 3)

Blackwell v. State, 510 S.W.2d 952 (1974) (theft, assault with intent to murder + 1)

Blake v. State, 468 S.W.2d 400 (1971) (assault with intent to murder + 2)

Boney v. State, 572 S.W.2d 529 (aggravated assault + 2)

Bosley v. State, 414 S.W.2d 468 (1967), cert. denied, 389 U.S. 876 (1967) (heroin possession, marijuana sale, robbery)

Bradley v. State, 403 S.W.2d 154 (1966); 456 S.W.2d 923 (1970) (robbery + 2)

Briley v. State, 413 S.W.2d 921 (1967); 492 S.W.2d 501 (1973) (assault with intent to murder with malice + 2)

Brooks v. State, 500 S.W.2d 636 (1973) (heroin possession, robbery by assault, attempted burglary)

Burton v. State, 471 S.W.2d 817 (1971) (burglary with intent to commit rape, burglary, attempted burglary)

Caraway v. State, 560 S.W.2d 690 (1978) (aggravated rape + 2)

Cedillo v. State, 484 S.W.2d 920 (1972) (robbery by assault + 2)

Chambers v. State, 401 S.W. 609 (1966) (robbery by assault + 2)

Chatman v. State, 513 S.W.2d 854 (1974) (carrying a pistol in a place where liquor is sold + 2)

Cooper v. State, 492 S.W.2d 545 (1973) (carrying a pistol in a place where liquor is sold + 2)

Croft, Ex parte, 429 S.W.2d 905 (1968) (robbery by assault + 2)

Darby v. State, 544 S.W.2d 407 (1977) (aggravated robbery + 2)

III. 1 VIOLENT OFFENSE, AT LEAST 2 OTHERS (cont.)

Davis v. State, 429 S.W.2d 459 (1968) (robbery by assault + 2)

Diaz v. State, 491 S.W.2d 166 (1973) (attempted rape + 2)

Eagan v. State, 451 S.W.2d 514 (1970) (burglary of a private home at night with intent to rape + 2)

Eldred v. State, 578 S.W.2d 721 (1978) (aggravated robbery, theft, 2 burglaries, forgery)

Espinoza v. State, 494 S.W.2d 562 (1973) (2 narcotics offenses, assault with intent to murder)

Faulwell v. State, 447 S.W.2d 940 (1969) (burglary, theft from a person, assault with intent to rob)

Foster v. State, 455 S.W.2d 243 (1970) (robbery, burglary + 1)

Garrett v. State, 434 S.W.2d 142 (1968) (robbery, theft + 1)

Gibson v. State, 430 S.W.2d 507 (1968) (assault with intent to commit murder + 2)

Grant v. State, 472 S.W.2d 531 (1971) (assault with intent to rape + 2)

Gutierrez v. State, 456 S.W.2d 84 (1970) (assault with intent to murder + 2)

Hill, Ex parte, 571 S.W.2d 800 (1978) (2 burglaries, assault with a dangerous weapon, forgery, sodomy)

Horne v. State, 508 S.W.2d 643 (1974) (robbery by assault, theft + 1)

Hubbard v. State, 579 S.W.2d 930 (1979) (aggravated robbery using a deadly weapon + 2)

Johnson v. State, 493 S.W.2d 241 (1973) (robbery by assault + 2)

Jones v. State, 449 S.W.2d 277 (1970); 456 S.W.2d 132 (1968) (attempted burglary, burglary, armed robbery)

Jones v. State, 406 S.W.2d 450 (1966) (robbery by assault, 2 thefts)

King v. State, No. 57,840 (June 13, 1979) (theft, assault with a prohibited weapon + 1)

Lemay, Ex parte, 525 S.W.2d 1 (1975) (burglary of a private residence at night, armed robbery + 1)

Lewis v. State, 530 S.W.2d 117 (1975) (robbery + 2)

Lucas v. State, 444 S.W.2d 638 (1969); 463 S.W.2d 200 (1971) (burglary with intent to commit theft, robbery by assault with a firearm + 1)

Lundy v. State, 477 S.W.2d 568 (1972) (robbery by assault + 2)

III. 1 VIOLENT OFFENSE, AT LEAST 2 OTHERS (cont.)

Madeley v. State, 388 S.W.2d 187 (1965); 488 S.W.2d 416 (1972) (burglary with intent to commit theft, burglary of a home at night, forgery, robbery by assault + 15)

Martinez v. State, 469 S.W.2d 185 (1971) (burglary with intent to commit theft, assault with intent to rape, theft + 1)

McGee v. State, 486 S.W.2d 942 (1972) (robbery by assault + 2)

Moreno v. State, 541 S.W.2d 170 (1977) (aggravated assault, possession of narcotics paraphanalia, theft)

Peters v. State, 575 S.W.2d 560 (1979) (arson, breaking and entering a motor vehicle with intent to commit theft, burglary)

Porter v. State, 566 S.W.2d 621 (1978) (heroin possession, robbery, theft)

Rhodes v. State, 450 S.W.2d 329 (1970), cert. denied, 400 U.S. 927 (1970) (assault with intent to murder with malice, 2 burglaries)

Sanford v. State, 550 S.W.2d 682 (1977) (aggravated assault, breaking and entering a coin-operated machine + 1)

Sanford, Ex parte, 562 S.W.2d 229 (1977) (robbery by assault, 2 thefts)

Saucier v. State, 563 S.W.2d 938 (1978) (aggravated robbery + 2)

Smith v. State, 450 S.W.2d 618 (1970) (robbery, theft + 1)

Smith, Ex parte, 513 S.W.2d 839 (1974); 430 S.W.2d 496 (1968) (forgery, accomplice to a murder with malice + 1)

Smith, Ex parte, 449 S.W.2d 266 (1969) (assault with intent to murder, 2 burglaries + 1)

Stratman v. State, 436 S.W.2d 144 (1968) (forgery, theft, assault with intent to murder)

Taylor v. State, 491 S.W.2d 922 (1973) (murder without malice + 2)

Turner v. State, 550 S.W. 686 (1977) (heroin possession, burglary, robbery)

Waffer v. State, 500 S.W.2d 659 (1973) (assault with intent to rob + 2)

West v. State, 511 S.W.2d 502 (1974) (3 indecent exposures, robbery by assault)

Williams v. State, 461 S.W.2d 614 (1970) (robbery by assault + 2)

Worton v. State, 488 S.W.2d 116 (1972); 492 S.W.2d 519 (1973) (bad check, robbery by assault with a firearm + 1)

III. 1 VIOLENT OFFENSE, AT LEAST 2 OTHERS (cont.)

Wright v. State, 468 S.W.2d 422 (1971) (2 thefts, heroin possession, burglary, robbery by assault, narcotics violation)

Zachary v. State, 505 S.W.2d 875 (1974) (robbery by assault + 2)

B. Reversed on Appeal (18 cases)

Alvarez v. State, 472 S.W.2d 762 (1971) (heroin sale, assault with intent to murder, forgery; reversed and remanded for a new trial on the third offense without the habitual offender charge)

Arline v. State, 529.S.W.2d 73 (1975) (robbery by assault + 2; reversed and released)

Bray v. State, 531 S.W.2d 633 (1977) (burglary with intent to rape, burglary + 1; reversed and remanded for a new trial on the third offense and as a two-time offender, but not as a three-time habitual offender)

Cullum v. State, 576 S.W.2d 87 (1979) (aggravated robbery + 2; reversed and remanded for a new trial, with a life sentence still possible)

Dowden v. State, 537 S.W.2d 5 (1977) (aggravated robbery + 2; reversed and remanded for a new trial, with a life sentence still possible)

Dubose v. State, 531 S.W.2d 330 (1975) (robbery + 2; reversed and remanded for a new trial, with a life sentence still possible)

Gonzales v. State, 578 S.W.2d 736 (1979) (aggravated robbery + 2; reversed and remanded for a new trial, with a life sentence still possible)

Harris v. State, 522 S.W.2d 199 (1975) (rape by force and threats + 2; reversed and remanded for a new trial, with a life sentence still possible)

Hickman v. State, 548 S.W.2d 736 (1977) (2 burglaries, aggravated robbery; reversed and remanded for a new trial, with a life sentence still possible)

Johnson v. State, 436 S.W.2d 906 (1968) (robbery with a firearm, 2 thefts, burglary of a home; reversed and resentenced for the third offense only, not as a habitual offender)

Millard, Ex parte, No. 61,495 (June 6, 1979) (aggravated robbery, attempted burglary with intent to commit theft + 1; reversed and remanded for a new trial on the third offense and as a two-time offender, but not as a three-time habitual offender)

Murchison, Ex parte, 560 S.W.2d 654 (1978) (marijuana possession, theft, assault with intent to rape; reversed and remanded for a new trial on the third offense without the habitual offender charge)

Perez v. State, No. 56,025 (Apr. 4, 1979) (aggravated robbery + 2; reversed and released)

III. 1 VIOLENT OFFENSE, AT LEAST 2 OTHERS (cont.)

Richardson v. State, 390 S.W.2d 773 (1965) (robbery + 2; reversed and remanded for a new trial, with a life sentence still possible)

Rogers, Ex parte, 486 S.W.2d 786 (1972); 519 S.W.2d 861 (1975) (burglary, robbery by assault, theft; reversed and resentenced as a two-time offender, but not as a three-time habitual offender)

Steeese, Ex parte, 459 S.W.2d 850 (1970) (robbery by assault, burglary, swindling; reversed and remanded for a new trial on the third offense without the habitual offender charge)

Wagoner v. State, 434 S.W.2d 868 (1968) (2 burglaries, robbery; reversed and resentenced as a two-time offender, but not as a three-time habitual offender)

Walton v. State, 575 S.W.2d 25 (1978) (robbery with bodily injury + 2; reversed and remanded for a new trial, with a life sentence still possible)

IV. 3 OR MORE SEMI-VIOLENT OFFENSES

A. Affirmed on Appeal (35 cases)

Auten, Ex parte, 447 S.W.2d 159 (1969); 458 S.W.2d 466 (1970) (attempted burglary, 2 burglaries)

Barnes v. State, 513 S.W.2d 850 (1974) (auto theft, 2 burglaries)

Brown v. State, 413 S.W.2d 922 (1967) (breaking and entering a motor vehicle with intent to commit theft, 2 burglaries)

Burton v. State, 493 S.W.2d 837 (1973) (burglary with intent to commit theft, burglary, attempted burglary)

Cadena v. State, 504 S.W.2d 910 (1974) (attempted burglary, 5 burglaries, theft)

Clark v. State, 500 S.W.2d 107 (1973) (3 burglaries)

Clark v. State, 424 S.W.2d 445 (1968) (3 burglaries)

Cooper v. State, 500 S.W.2d 837 (1974) (3 burglaries with intent to commit theft)

Dora, Ex parte, 477 S.W.2d 20 (1972) (3 burglaries)

Gates v. State, 471 S.W.2d 857 (1971) (3 burglaries)

Haines v. State, 391 S.W.2d 58 (1965) (3 burglaries + 1)

Hathorne v. State, 459 S.W.2d 826 (1970), cert. denied, 402 U.S. 914 (1977) (burglary with intent to commit theft, 2 burglaries)

Hendrick v. State, 488 S.W.2d 814 (1972) (3 burglaries)

Hollins v. State, 571 S.W.2d 873 (1978) (burglary of a building, theft, breaking and entering a motor vehicle with intent to commit theft, attempted burglary)

IV. 3 OR MORE SEMI-VIOLENT OFFENSES (cont.)

Joshlin v. State, 488 S.W.2d 773 (1972) (3 auto thefts)

Juarez v. State, 496 S.W.2d 638 (1973) (3 burglaries)

LeBlanc v. State, 424 S.W.2d 434 (1968) (3 burglaries)

Lee v. State, 400 S.W.2d 909 (1966) (3 burglaries)

Mack v. State, 480 S.W.2d 195 (1972) (3 burglaries)

Mullins v. State, 409 S.W.2d 869 (1966) (3 burglaries + 13)

Powell v. State, 475 S.W.2d 934 (1972) (3 burglaries with intent to commit theft)

Prodon v. State, 555 S.W.2d 451 (1977) (attempted burglary, 2 burglaries)

Rascon v. State, 496 S.W.2d 99 (1973) (2 burglaries, passing a counterfeit note, mail theft, 4 shopliftings)

Rodriguez v. State, 419 S.W.2d 372 (1967) (burglary, 2 burglaries with intent to commit theft)

Roper v. State, 558 S.W.2d 482 (1977) (burglary with intent to commit theft, 4 burglaries, 4 thefts + 1)

St. Jules v. State, 438 S.W.2d 568 (1969) (3 burglaries)

Sims v. State, 388 S.W.2d 714 (1965) (3 burglaries)

Stauts, Ex parte, 482 S.W.2d 638 (1972) (5 burglaries)

Wesley v. State, 388 S.W.2d 431 (1965) (2 burglaries, 1 attempted burglary)

Wheat v. State, 442 S.W.2d 363 (1969) (burglary with intent to commit theft, 2 burglaries)

Williams v. State, 504 S.W.2d 477 (1974) (11 burglaries, theft)

Williams v. State, 476 S.W.2d 698 (1972) (3 burglaries with intent to commit theft)

Williams v. State, 463 S.W.2d 15 (1971) (3 burglaries)

Woodard, Ex parte, 541 S.W.2d 187 (1976) (burglary, 2 driving while intoxicateds, embezzlement)

Young v. State, 488 S.W.2d 820 (1972) (attempted burglary, 2 burglaries)

B. Reversed on Appeal (8 cases)

Bryan, Ex parte, 442 S.W.2d 371 (1968) (3 burglaries; reversed and remanded for a new trial, with a life sentence still possible)

Holcombe v. State, 424 S.W.2d 635 (1968) (3 burglaries; reversed and remanded for a new trial, with a life sentence still possible)

IV. 3 OR MORE SEMI-VIOLENT OFFENSES (cont.)

Jackson v. State, 449 S.W.2d 279 (1970) (3 burglaries; reversed and resentenced as a two-time offender, but not as a three-time habitual offender)

Lee v. State, 555 S.W.2d 121 (1977) (3 attempted burglaries; reversed and remanded for a new trial, with a life sentence still possible)

McCartor v. State, 438 S.W.2d 575 (1969) (3 burglaries; reversed and remanded for a new trial, with a life sentence still possible)

Rounsvall v. State, 480 S.W.2d 696 (1972) (3 burglaries; reversed and resentenced as a two-time offender, but not as a three-time habitual offender)

Scott v. State, 553 S.W.2d 361 (1977) (3 burglaries with intent to commit theft; reversed and remanded for resentencing, with a life sentence still possible)

Shivers, Ex parte, 501 S.W.2d 898 (1973) (burglary with intent to commit theft, 2 burglaries; reversed and resentenced as a two-time offender, but not as a three-time habitual offender)

V. 2 SEMI-VIOLENT OFFENSES, AT LEAST 1 OTHER

A. Affirmed on Appeal (29 cases)

Anderson v. State, 401 S.W.2d 612 (1966) (auto theft, theft, burglary)

Blanton v. State, 426 S.W.2d 871 (1968) (2 burglaries, receiving and concealing stolen property)

Casey v. State, 475 S.W.2d 920 (1972) (theft from a person, theft, breaking and entering a motor vehicle with intent to commit theft)

Castaneda v. State, 491 S.W.2d 885 (1973) (burglary of a private residence at night with intent to commit theft, burglary with intent to commit theft + 1)

Davis v. State, 429 S.W.2d 895 (1968), cert. denied, 393 U.S. 1096 (1969); 398 S.W.2d 940 (1966) (receiving and concealing stolen property, 2 driving while intoxicateds + 1)

Dollar v. State, 418 S.W.2d 689 (1967) (breaking and entering a motor vehicle with intent to commit theft, burglary, theft)

Espinosa v. State, 463 S.W.2d 8 (1971) (burglary with intent to commit theft, forgery, burglary)

Fletcher v. State, 442 S.W.2d 705 (1969); 396 S.W.2d 393 (1965) (2 burglaries, theft)

Flores v. State, 479 S.W.2d 683 (1972) (forgery, burglary, theft from a person)

Garay v. State, 389 S.W.2d 952 (1965) (2 burglaries, theft)

Garcia v. State, 513 S.W.2d 559 (1974) (2 burglaries, theft)

V. 2 SEMI-VIOLENT OFFENSES, AT LEAST 1 OTHER (cont.)

Herrera v. State, 493 S.W.2d 809 (1973); 462 S.W.2d 597 (1971) (heroin possession, 2 burglaries)

Jones v. State, 482 S.W.2d 634 (1972) (breaking and entering a motor vehicle with intent to commit theft, unlawful entry into a motor vehicle with intent to commit theft, theft)

Kessler v. State, 514 S.W.2d 260 (1974) (2 burglaries with intent to commit theft, theft)

Langer v. State, 489 S.W.2d 926 (1973); 343 S.W.2d 463 (pandering, 2 burglaries)

McClain v. State, 493 S.W.2d 528 (1973); 505 S.W.2d 825 (1974) (shoplifting, burglary of a coin-operated machine, burglary, theft + 2)

Mistrat v. State, 471 S.W.2d 831 (1971) (marijuana sale, 2 breaking and entering a coin-operated machine)

Norris v. State, 488 S.W.2d 84 (1972) (2 burglaries, theft)

Plessinger v. State, 536 S.W.2d 380 (1976) (2 burglaries with intent to commit theft + 1)

Richardson v. State, 432 S.W.2d 100 (1968) (2 burglaries, theft)

Salazar v. State, 492 S.W.2d 494 (1973) (heroin possession, 2 burglaries)

Scott, Ex parte, 485 S.W.2d 921 (1972) (2 burglaries + 1)

Shapley, Ex parte, 458 S.W.2d 687 (1970) (theft, 2 burglaries)

Shivers v. State, 574 S.W.2d 147 (1978); 460 S.W.2d 915 (1970) (burglary with intent to commit theft, burglary, heroin possession)

Smith v. State, 486 S.W.2d 374 (1972) (shoplifting, 2 burglaries)

Stevenson v. State, 395 S.W.2d 626 (1965) (theft, burglary, grand larceny)

Tristan v. State, 510 S.W.2d 329 (1974) (2 burglaries with intent to commit theft, heroin sale)

Vestal, Ex parte, 402 S.W.2d 195 (1966); 468 S.W.2d 372 (1971) (theft, 2 driving while intoxicateds + 1)

Villareal v. State, 468 S.W.2d 837 (1971) (burglary with intent to commit theft, theft, burglary)

B. Reversed on Appeal (8 cases)

Andrews v. State, 407 S.W.2d 507 (1966) (marijuana, 2 burglaries; reversed and remanded for resentencing, with a life sentence still possible)

Bird, Ex parte, 449 S.W.2d 41 (1970); 457 S.W.2d 559 (1970) (2 burglaries with intent to commit theft, child desertion; reversed and resentenced as a two-time offender, but not as a three-time habitual offender)

V. 2 SEMI-VIOLENT OFFENSES, AT LEAST 1 OTHER (cont.)

Bowie v. State, 401 S.W.2d 829 (1966) (2 burglaries, theft; reversed and remanded for resentencing, with a life sentence still possible)

Dodty v. State, 493 S.W.2d 787 (1973) (2 burglaries, theft; reversed and resentenced as a two-time offender, but not as a three-time habitual offender)

Garner v. State, 552 S.W.2d 809 (1977) (forgery, 2 burglaries; reversed and remanded for a new trial, with a life sentence still possible)

Jones v. State, 422 S.W.2d 183 (1967) (attempted burglary, burglary, forgery; reversed and remanded for a new trial, with a life sentence still possible)

Posey, Ex parte, 456 S.W.2d 140 (1970) (cattle theft, burglary + 1; reversed and released)

Webster, Ex parte, 497 S.W.2d 305 (1973) (2 thefts, 2 driving while intoxicateds; reversed and released)

VI. 1 SEMI-VIOLENT OFFENSE, AT LEAST 2 OTHERS

A. Affirmed on Appeal (84 cases)

Allen v. State, 451 S.W.2d 484 (1970) (burglary with intent to commit theft, theft + 1)

Baity v. State, 455 S.W.2d 305 (1970), cert. denied, 400 U.S. 918 (1970) (burglary + 2)

Beasley v. State, 389 S.W.2d 299 (1965), cert. denied, 382 U.S. 990 (1966) (burglary + 2)

Bennett v. State, 455 S.W.2d 239 (1970) (attempted burglary + 2)

Blaine, Ex parte, 472 S.W.2d 514 (1973) (burglary, forgery + 1)

Blakenship v. State, 432 S.W.2d 945 (1968) (burglary + 2)

Broussard v. State, 505 S.W.2d 282 (1974) (attempted burglary + 2)

Byrd v. State, 491 S.W.2d 440 (1973) (burglary with intent to commit theft + 2)

Carter v. State, 487 S.W.2d 361 (1972) (burglary + 2)

Carter v. State, 408 S.W.2d 507 (1966) (theft from a person + 2)

Castillo v. State, 494 S.W.2d 844 (1973) (burglary + 2)

Childress v. State, 472 S.W.2d 133 (1972) (burglary, narcotics possession, forgery)

Clark v. State, 493 S.W.2d 512 (1973) (burglary + 2)

Cleveland v. State, 493 S.W.2d 145 (1973) (narcotics sale, burglary, marijuana possession)

VI. 1 SEMI-VIOLENT OFFENSE, AT LEAST 2 OTHERS (cont.)

Coleman State, 451 S.W.2d 911 (1970) (burglary + 2)

Coursey v. State, 457 S.W.2d 565 (1970) (burglary + 2)

Denman v. State, 425 S.W.2d 361 (1968) (burglary + 2)

Engle, Ex parte, 418 S.W.2d 671 (1967) (burglary with intent to commit theft + 4)

Finch v. State, 399 S.W.2d 544 (1966) (burglary + 2)

Flores v. State, 472 S.W.2d 146 (1971) (attempted burglary + 2)

Franklin v. State, 457 S.W.2d 53 (1970) (burglary with intent to commit theft + 2)

Gaines v. State, 501 S.W.2d 315 (1974) (auto theft + 2)

Gardner v. State, 486 S.W.2d 805 (1972) (burglary, forgery + 1)

Gordon, Ex parte, 439 S.W.2d 354 (1969) (burglary + 2)

Green v. State, 542 S.W.2d 416 (1977); 437 S.W.2d 859 (1969) (burglary, bad check + 1)

Greer, Ex parte, 408 S.W.2d 711 (1966) (burglary + 2)

Grissam v. State, 403 S.W.2d 414 (1966) (burglary + 2)

Hall v. State, 475 S.W.2d 778 (1972) (burglary with intent to commit theft + 2)

Hall v. State, 450 S.W.2d 90 (1969) (burglary with intent to commit theft + 2)

Hamilton v. State, 397 S.W.2d 225 (1965) (2 forgeries, burglary)

Harris v. State, 471 S.W.2d 390 (1971) (attempted burglary + 2)

Harvey v. State, 485 S.W.2d 907 (1972) (breaking and entering a coin-operated machine, theft, marijuana possession)

Head v. State, 419 S.W.2d 375 (1967) (burglary with intent to commit theft, forgery + 1)

Hendrix v. State, 474 S.W.2d 230 (1971) (burglary with intent to commit theft + 2)

Heredia v. State, 528 S.W.2d 847 (1975) (burglary, forgery + 1)

Hill v. State, 429 S.W.2d 481 (1968) (auto theft + 2)

Holcombe v. State, 448 S.W.2d 493 (1970) (burglary + 2)

Joshlin v. State, 491 S.W.2d 423 (1973) (breaking and entering a motor vehicle with intent to commit theft + 2)

Kendrick v. State, 466 S.W.2d 778 (1971) (breaking and entering a motor vehicle with intent to commit theft + 2)

VI. 1 SEMI-VIOLENT OFFENSE, AT LEAST 2 OTHERS (cont.)

Landrum v. State, 456 S.W.2d 914 (1970) (burglary with intent to commit theft + 2)

Leopard, Ex parte, 520 S.W.2d 759 (1975) (burglary with intent to commit theft + 2)

Little v. State, 567 S.W.2d 502 (1978) (burglary of a building + 3)

Longoria v. State, 507 S.W.2d 753 (1974) (burglary + 2)

Lujan v. State, 452 S.W.2d 917 (1970) (heroin possession, narcotics possession, burglary)

Martin v. State, 492 S.W.2d 471 (1973) (burglary + 2)

Mauldin v. State, 473 S.W.2d 935 (1971) (burglary + 2)

McCardell v. State, 557 S.W.2d 289 (1977) (burglary + 2)

Mills v. State, 417 S.W.2d 69 (1967); 508 S.W.2d 823 (1974) (theft, attempted burglary + 1)

Morgan v. State, 507 S.W.2d 538 (1974) (burglary, 2 thefts)

Morgan v. State, 503 S.W.2d 770 (1974) (burglary + 2)

Norris v. State, 482 S.W.2d 280 (1972) (burglary with intent to commit theft + 2)

Ojeda v. State, 428 S.W.2d 811 (1968) (burglary, narcotics violation + 1)

Pierce v. State, 401 S.W.2d 238 (1966) (burglary + 2)

Puentes v. State, 463 S.W.2d 730 (1971) (burglary with intent to commit theft + 2)

Reed v. State, 481 S.W.2d 814 (1972) (burglary + 2)

Reyes v. State, 579 S.W.2d 927 (1979) (burglary of a building + 2)

Roberts v. State, 483 S.W.2d 266 (1972) (burglary with intent to commit theft + 2)

Rodriguez, Ex parte, 560 S.W.2d 94 (1978) (burglary of a home, 2 heroin possessions)

Samora v. State, 474 S.W.2d 242 (1972) (burglary + 2)

Sanchez v. State, 452 S.W.2d 474 (1970) (burglary with intent to commit theft + 2)

Schafer v. State, 436 S.W.2d 352 (1968) (burglary + 2)

Silva v. State, 499 S.W.2d 147 (1973) (burglary + 2)

Simmons v. State, 493 S.W.2d 937 (1973) (forgery, theft, burglary)

Smith v. State, 502 S.W.2d 133 (1974) (auto theft + 2)

Stoneham v. State, 389 S.W.2d 468 (1965), cert. denied, 386 U.S. 928 (1967) (burglary + 2)

VI. 1 SEMI-VIOLENT OFFENSE, AT LEAST 2 OTHERS (cont.)

Stovall v. State, 480 S.W.2d 223 (1972) (burglary with intent to commit theft + 2)

Sumrell v. State, 436 S.W.2d 544 (1968) (theft from a person + 2)

Sutton v. State, 519 S.W.2d 422 (1975) (burglary with intent to commit theft, forgery + 1)

Thomas v. State, 543 S.W.2d 645 (1976) (burglary + 2)

Thomas v. State, 387 S.W.2d 665 (1965) (burglary + 2)

Thrasher v. State, 450 S.W.2d 69 (1970) (burglary with intent to commit theft + 2)

Tinney v. State, 578 S.W.2d 137 (1979) (burglary + 2)

Turner v. State, 409 S.W.2d 400 (1966) (burglary with intent to commit theft + 2)

Tyra v. State, 548 S.W.2d 912 (1977); 534 S.W.2d 695 (1976) (fondling a child + 2)

Viera v. State, 493 S.W.2d 160 (1973) (burglary + 2)

Walters v. State, 491 S.W.2d 685 (1973) (burglary + 2)

Welch v. State, 392 S.W.2d 139 (1965) (attempted burglary + 2)

White v. State, 517 S.W.2d 543 (1974), cert. denied, 386 U.S. 1014 (1975) (heroin sale, burglary + 1)

White v. State, 500 S.W.2d 529 (1973) (burglary + 4)

White v. State, 410 S.W.2d 440 (1966) (attempted burglary + 2)

Williams v. State, 544 S.W.2d 428 (1976) (attempted burglary + 2)

Williams v. State, 537 S.W.2d 936 (1976) (burglary + 2)

Young v. State, 573 S.W.2d 817 (1978) (burglary of a building with intent to commit theft + 2)

Young v. State, 552 S.W.2d 441 (1977) (burglary, 2 heroin possessions)

B. Reversed on Appeal (22 cases)

Bevill v. State, 573 S.W.2d 781 (1978) (burglary of a building + 2; reversed and remanded for a new trial, with a life sentence still possible)

Bullard v. State, 533 S.W.2d 812 (1976) (theft, burglary, forgery; reversed and remanded for resentencing, with a life sentence still possible)

Campbell, Ex parte, 494 S.W.2d 842 (1973) (burglary + 2; reversed and remanded for a new trial, with a life sentence still possible)

VI. 1 SEMI-VIOLENT OFFENSE, AT LEAST 2 OTHERS (cont.)

Chaney v. State, 494 S.W.2d 813 (1973) (amphetamine sale, forgery, burglary; reversed and remanded for a new trial, with a life sentence still possible).

Columbus, Ex parte, 489 S.W.2d 562 (1973) (burglary with intent "to commit theft + 2; reversed and remanded for a new trial with a life sentence still possible")

Cooper, Ex parte, 493 S.W.2d 810 (1973) (2 thefts, auto theft; reversed and remanded for a new trial on the third offense without the habitual offender charge)

Day v. State, 534 S.W.2d 681 (1976) (burglary + 2; reversed and released or reversed and remanded for a new trial, with a life sentence still possible)

Dues v. State, 456 S.W.2d 116 (1970) (burglary with intent to commit theft + 2; reversed and remanded for a new trial, with a life sentence still possible)

Escobar v. State, 578 S.W.2d 139 (1979) (burglary + 2; reversed and released)

Foster v. State, 497 S.W.2d 291 (1973) (burglary + 2; reversed and remanded for a new trial, with a life sentence still possible)

Gorton, Ex parte, 564 S.W.2d 766 (1978) (burglary + 2; reversed and remanded for a new trial, with a life sentence still possible)

Hayter v. State, 541 S.W.2d 435 (1977) (burglary + 2; reversed and remanded for a new trial, with a life sentence still possible)

Henson v. State, 530 S.W.2d 584 (1975) (burglary + 2; reversed and remanded for resentencing, with a life sentence still possible)

Heredia v. State, 468 S.W.2d 833 (1971); 508 S.W.2d 629 (2 heroin possessions, burglary with intent to commit theft; reversed and remanded for a new trial, with a life sentence still possible)

Hutchinson v. State, 481 S.W.2d 881 (1972) (burglary with intent to commit theft, forgery, theft; reversed and resented as a two-time offender, but not as a three-time habitual offender)

McCloud v. State, 527 S.W.2d 885 (1975) (burglary + 2; reversed and remanded for a new trial, with a life sentence still possible)

McDonald, Ex parte, 469 S.W.2d 173 (1971) (2 thefts, burglary; reversed and released)

Pugh, Ex parte, 465 S.W.2d 946 (1971) (burglary + 2; reversed and remanded for a new trial, with a life sentence still possible)

Resendez v. State, 495 S.W.2d 934 (1973); 523 S.W.2d 700 (1975) (burglary of a private residence at night + 3; reversed and remanded for a new trial, with a life sentence still possible)

VI. 1 SEMI-VIOLENT OFFENSE, AT LEAST 2 OTHERS (cont.)

Smith v. State, 507 S.W.2d 779 (1974) (burglary + 2; reversed and remanded for a new trial, with a life sentence still possible)

Smith v. State, 501 S.W.2d 657 (1974) (auto theft by a bailee + 2; reversed and remanded for a new trial, with a life sentence still possible)

Townsend v. State, 427 S.W.2d 55 (1968) (burglary with intent to commit theft + 2; reversed and remanded for a new trial, with a life sentence still possible)

VII. 2 OR MORE DRUG OFFENSES

A. Affirmed on Appeal (4 cases)

Aranda v. State, 506 S.W.2d 221 (1974) (marijuana possession, heroin possession + 1)

Arce v. State, 552 S.W.2d 163 (1977) (2 heroin possessions, heroin sale + 1)

Armendariz v. State, 529 S.W.2d 525 (1975) (hard narcotics paraphernalia possession, heroin possession + 1)

Browne v. State, 542 S.W.2d 143 (1976) (heroin possession, LSD possession + 1)

B. Reversed on Appeal (3 cases)

Giacona, Ex parte, 397 S.W.2d 863 (1965); 518 S.W.2d 832 (1965) (3 marijuana possessions)

White v. State, 486 S.W.2d 377 (1972) (heroin possession, narcotics paraphernalia possession + 1)

Taylor, Ex parte, 484 S.W.2d 748 (1972) (narcotics possession, forgery, nonpayment of marijuana transfer tax; reversed and remanded for a new trial on the third offense without the habitual offender charge)

VIII. 1 DRUG OFFENSE, AT LEAST 2 OTHERS

A. Affirmed on Appeal

1. Heroin (20 cases)

Arechiga v. State, 462 S.W.2d 1 (1971) (heroin possession + 2)

Britton v. State, 578 S.W.2d 685 (1978) (heroin possession + 2)

Chaney v. State, 474 S.W.2d 711 (1972); 477 S.W.2d 580 (1972) (theft, heroin possession + 1)

Cherry v. State, 479 S.W.2d 924 (1972) (heroin possession + 2)

Coleman v. State, 481 S.W.2d 872 (1972) (heroin sale + 2)

VIII. 1 DRUG OFFENSE, AT LEAST 2 OTHERS (cont.)

Davis v. State, 504 S.W.2d 908 (1974) (heroin sale + 3)
Evans v. State, 456 S.W.2d 911 (1970) (heroin possession + 2)
Fuentes v. State, 491 S.W.2d 419 (1973) (heroin sale + 3)
Gomez v. State, 461 S.W.2d 422 (1970) (heroin possession + 2)
Gomez v. State, 470 S.W.2d 871 (1971) (heroin possession + 2)
Gonzales v. State, 500 S.W.2d 154 (1973) (heroin sale + 2)
Hernandez v. State, 530 S.W.2d 563 (1975) (heroin delivery + 2)
Montgomery v. State, 506 S.W.2d 623 (1974) (heroin sale + 2)
O'Quinn v. State, 462 S.W.2d 583 (1970) (heroin possession + 2)
Perez v. State, 495 S.W.2d 242 (1973) (heroin sale + 2)
Reeves v. State, 500 S.W.2d 648 (1973) (heroin possession + 10)
Rodriguez v. State, 530 S.W.2d 944 (1977) (heroin delivery + 2)
Sanchez v. State, 468 S.W.2d 814 (1971) (heroin sale + 2)
Sigard v. State, 537 S.W.2d 736 (1976) (heroin sale + 2)
Torres v. State, 552 S.W.2d 821 (1977) (heroin possession + 2)

2. Unidentified Narcotics (3 cases)

Capuchino v. State, 389 S.W.2d 296 (1965), cert. denied, 386 U.S. 928 (1967) (narcotics paraphernalia possession + 2)
Rios v. State, 557 S.W.2d 87 (1977) (narcotics delivery, theft + 1)
Thomas v. State, 468 S.W.2d 418 (1971) (theft, narcotics possession + 1)

3. Marijuana (2 cases)

Carvahal v. State, 529 S.W.2d 517 (1975), cert. denied, 424 U.S. 926 (1976) (marijuana possession + 2)
Finklea v. State, 481 S.W.2d 889 (1972) (marijuana possession + 2)

B. Reversed on Appeal (1 case)

Hernandez v. State, 563 S.W.2d 947 (1978) (heroin delivery + 2; reversed and remanded for a new trial, with a life sentence still possible)

IX. 1 OR MORE SEX OFFENSES

A. Affirmed on Appeal (5 cases)

Almand v. State, 536 S.W.2d 377 (1976) (indecent exposure to a minor, aggravated crime against nature + 1)
Bowles v. State, 550 S.W.2d 84 (1977) (indecent exposure to a minor, indecent exposure + 1)
Carter v. State, 461 S.W.2d 620 (1970) (indecent exposure to a minor + 3)
Fobbs v. State, 468 S.W.2d 392 (1971) (indecent exposure to a minor + 2)
Hill v. State, 480 S.W.2d 670 (1972) (incest + 2)

B. Reversed on Appeal (1 case)

Komurke v. State, 562 S.W.2d 230 (1978) (sodomy + 2; reversed and remanded for resentencing, with a life sentence still possible)

X. 1 NONVIOLENT OFFENSE, AT LEAST 2 UNKNOWN OFFENSES

A. Affirmed on Appeal (21 cases)

Alexander v. State, 456 S.W.2d 120 (1970) (theft + 2)
Brown v. State, 443 S.W.2d 261 (1969) (theft + 2)
Burks v. State, 432 S.W.2d 925 (1968) (forgery + 3)
Castanuela v. State, 435 S.W.2d 146 (1968) (forgery + 3)
Castillo v. State, 469 S.W.2d 572 (1971) (theft + 2)
Cedargreen v. State, 432 S.W.2d 524 (1968) (forgery + 2)
Cole v. State, 475 S.W.2d 263 (1971) (theft + 3)
Curtis v. State, 500 S.W.2d 478 (1973) (shoplifting + 2)
Knox v. State, 400 S.W.2d 750 (1966) (theft + 2)
Masters v. State, 437 S.W.2d 868 (1969) (theft + 2)
McCarty v. State, 498 S.W.2d 212 (1973) (forgery + 2)
Mitchell v. State, 494 S.W.2d 865 (1973), cert. denied, 414 U.S. 1163 (1974) (theft + 2)
Nichols v. State, 474 S.W.2d 205 (1971) (theft + 2)
Prodan v. State, 574 S.W.2d 100 (1978) (credit card abuse + 2)
Query v. State, 485 S.W.2d 924 (1972) (theft + 2)
Scallion v. State, 433 S.W.2d 438 (1968) (forgery + 2)

X. 1 NONVIOLENT OFFENSE, AT LEAST 2 UNKNOWN OFFENSES (cont.)

- Shaver v. State, 496 S.W.2d 604 (1973) (shoplifting + 2)
Speights v. State, 499 S.W.2d 119 (1973) (theft + 2)
Tinsley v. State, 461 S.W.2d 605 (1970) (theft + 2)
Vandall v. State, 438 S.W.2d 578 (1969) (forgery + 2)
Young v. State, 401 S.W.2d 599 (1966) (theft + 2)

B. Reversed on Appeal (9 cases)

Anaya v. State, 507 S.W.2d 561 (1974) (theft + 2; reversed and resentenced for the third offense only, not as a habitual offender)

Carter v. State, 510 S.W.2d 323 (1974) (embezzlement + 2; reversed and remanded for a new trial, with a life sentence still possible)

Cross, Ex parte, 427 S.W.2d 64 (1968) (theft + 2; reversed and remanded for a new trial, with a life sentence still possible)

Nash, Ex parte, 389 S.W.2d 957 (1965) (swindling + 2; reversed and remanded for a new trial on the third offense without the habitual offender charge)

Pool v. State, 528 S.W.2d 255 (1975) (theft + 2; reversed and remanded for a new trial, with a life sentence still possible)

Swinney, Ex parte, 499 S.W.2d 101 (1973) (theft + 2; reversed and released)

Teagle, Ex parte, 420 S.W.2d 612 (1967) (theft + 2; reversed and released)

Washington, Ex parte, 442 S.W.2d 391 (1969) (theft + 2; reversed and remanded for a new trial, with a life sentence still possible)

Young, Ex parte, 517 S.W.2d 288 (1974) (theft + 2; reversed and remanded for a new trial, with a life sentence still possible)

XI. 2 NONVIOLENT OFFENSES, AT LEAST 1 UNKNOWN OFFENSE

A. Affirmed on Appeal (5 cases)

- Loud v. State, 499 S.W.2d 295 (1973) (2 thefts + 1)
Olson v. State, 394 S.W.2d 511 (1965); 484 S.W.2d 756 (1969) (2 forgeries + 8)
Passmore v. State, 544 S.W.2d 399 (1976) (counterfeiting a driver's license, theft + 1)
Pendleton v. State, 434 S.W.2d 694 (1968) (2 forgeries + 1)
Schultz v. State, 510 S.W.2d 940 (1974) (2 thefts + 1)

XI. 2 NONVIOLENT OFFENSES, AT LEAST 1 UNKNOWN OFFENSE (cont.)

B. Reversed on Appeal (3 cases)

Hill, Ex parte, 417 S.W.2d 404 (1967) (forgery, theft + 1; reversed and released)

Kellison, Ex parte, 422 S.W.2d 729 (1968) (2 forgeries + 1; reversed and released)

Walters, Ex parte, 431 S.W.2d 552 (1968) (2 thefts + 1; reversed and released)

XII. 3 OR MORE NONVIOLENT OFFENSES (8 cases)

Branch v. State, 445 S.W.2d 756 (1969) (3 thefts)

Culbert v. State, 415 S.W.2d 646 (1966) (3 thefts)

Guyton v. State, 472 S.W.2d 130 (1971) (3 forgeries)

Morgan v. State, 435 S.W.2d 862 (1968) (3 thefts)

Mulchahey v. State, 547 S.W.2d 112 (1978) (5 thefts)

Tawater v. State, 408 S.W.2d 122 (1966) (2 thefts, embezzlement)

Wilburn v. State, 418 S.W.2d 832 (1967) (3 thefts)

Woods v. State, 394 S.W.2d 513 (1965) (2 thefts, shoplifting)

FELONIES IN TEXAS,
BY CATEGORY

I. CAPITAL FELONIES

Punishment: death or life sentence, P.C. § 19.03

<u>Penal Code §</u>	<u>Offense</u>
19.03	<u>Capital murder, i.e., murder</u> (1) for pay; (2) of a policeman, fireman, or prison guard acting on official duties; (3) while attempting to escape from prison; or (4) committed in the course of attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson

II. FIRST-DEGREE FELONIES

Punishment: 5-99 years, P.C. § 12.32

15.01	<u>Attempt to commit a capital felony</u>
15.02	<u>Conspiracy to commit a capital felony</u>
15.03	<u>Solicitation to commit a capital felony</u>
19.02	<u>Murder</u>
20.04	<u>Aggravated kidnapping</u>
21.03	<u>Aggravated rape</u>
21.05	<u>Aggravated sexual abuse</u>
22.03	<u>Deadly assault on a peace officer</u>
28.02	<u>Arson causing bodily injury less than death</u>
29.03	<u>Aggravated robbery</u>
30.02	<u>Burglary:</u> (1) of a habitation; (2) if any party is armed with explosives or a deadly weapon; or (3) if any of the offenders injures or attempts to injure anyone while effecting entry or in flight

c.s. 1/

4.02(b) & Manufacture, delivery, or possession with intent
4.03(a) & to manufacture or deliver of a specified controlled
(b)(1) substance, including heroin, opium, lysergic acid diethylamide ("LSD"), certain amphetamines, morphine, cocaine, codeine, and methadone

1/ Controlled Substances Act, 1973 Tex. Gen. Laws, ch. 429, at 1132, as amended, Tex. Rev. Civ. Stat. Ann. art. 4476-15 (Supp. 1978).

III. SECOND-DEGREE FELONIES

Punishment: 2-20 years, P.C. § 12.33

<u>Penal Code §</u>	<u>Offense</u>
15.01	<u>Attempt to commit a first-degree felony</u>
15.02	<u>Conspiracy to commit a first-degree felony</u>
15.03	<u>Solicitation to commit a first-degree felony</u>
19.04	<u>Voluntary manslaughter</u>
20.04	<u>Aggravated kidnapping if the victim is released voluntarily, alive, and in a safe place</u>
21.02	<u>Rape</u>
21.04	<u>Sexual abuse</u>
21.09	<u>Rape of a child under 17</u>
21.10	<u>Sexual abuse of a child</u>
22.04	<u>Injury to a child</u>
28.02	<u>Arson not causing bodily injury</u>
28.03	<u>Criminal mischief if the pecuniary loss exceeds \$10,000</u>
29.02	<u>Robbery</u>
30.02	<u>Burglary</u>
31.03	<u>Theft of property worth more than \$10,000</u>
31.04	<u>Theft of service worth more than \$10,000</u>
32.21	<u>Forgery of</u> (1) an instrument issued by any governmental entity or (2) stocks, bonds, or other instruments representing claims against others
32.45	<u>Misapplication of fiduciary property or property of a financial institution worth more than \$10,000</u>
36.02	<u>Bribery of or acceptance of a bribe by a public servant, party official, or voter</u>
38.07	<u>Escape using a deadly weapon by an inmate or one charged with or convicted of a felony</u>
38.10	<u>Giving an inmate a deadly weapon to facilitate an escape</u>
43.05	<u>Compelling prostitution</u>
46.06	<u>Possession of certain weapons, i.e.,</u> (1) an explosive weapon, (2) a machine gun, (3) a short-barrel firearm, or (4) a firearm silencer

III. SECOND DEGREE FELONIES (cont.)

C.S §

- 4.02(b) & Possession of a specified controlled substance,
 4.04(a) & including heroin, opium, LSD, certain amphetamines,
 (b)(1) morphine, cocaine, codeine, and methadone
- 3.08 & Refusal to follow statutory procedures by a person
 4.08 licensed to work with controlled substances,
 including:
 (1) distribution of a controlled substance
 except according to statutory procedures,
 (2) failure to maintain statutorily required
 information, or
 (3) refusal of entry for a statutorily authorized
 inspection
- 3.07 & Designated fraudulent acts with respect to
 4.09(a) & specified controlled substances, including heroin,
 (b)(1) opium, LSD, mescaline, peyote, morphine, psilocybin,
 codeine, marijuana, and methadone

IV. THIRD-DEGREE FELONIES

Punishment: 2-10 years, P.C. § 12.34

- 15.01 Attempt to commit a second-degree felony
- 15.02 Conspiracy to commit a second-degree felony
- 16.01 Possession of a criminal instrument with intent to use it in committing an offense
- 19.05 Involuntary manslaughter
- 20.02 False imprisonment if the defendant recklessly exposes the victim to a substantial risk of serious bodily injury
- 20.03 Kidnapping
- 21.11 Indecency with a child
- 22.02 Aggravated assault
- 25.01 Bigamy
- 25.02 Incest
- 25.03 Interference with child custody
- 25.05 Criminal nonsupport of a minor child or needy spouse if the defendant
 (1) has a prior conviction for criminal non-support or
 (2) commits the offense while residing in another state

IV. THIRD-DEGREE FELONIES (cont.)

<u>Penal Code §</u>	<u>Offense</u>
28.03	<u>Criminal mischief</u> (1) if the pecuniary loss is greater than \$200 but less than \$10,000; (2) regardless of pecuniary damage if (a) one causes the impairment or interruption of public communication, transportation, water, gas, power, or other public service; (b) the property damaged was a fence used for production of cattle, horses, sheep, swine, or goats; or (c) damage was inflicted by branding one or more head of cattle, horses, sheep, swine, or goats
30.04	<u>Burglary of a vehicle</u>
31.03	<u>Theft</u> (1) of property worth more than \$200 but less than \$10,000; (2) of one or more head of cattle, horses, sheep, swine, or goats; (3) from a person, a human corpse, or a grave; or (4) of property worth less than \$200 if the defendant has two prior theft convictions
31.04	<u>Theft of service</u> worth more than \$200 but less than \$10,000
31.05	<u>Theft of trade secrets</u>
31.07	<u>Unauthorized use of a vehicle</u>
32.21	<u>Forgery</u> of a will, codicil, deed, deed of trust, mortgage, security instrument or agreement, credit card, check or similar sight order for payment of money, contract, release, or other commercial instrument
32.31	<u>Credit card abuse</u>
32.33	<u>Hindering secured creditors</u> , i.e., removing property from the state to hinder enforcement of a security interest or lien
32.43	<u>Commercial bribery</u>
32.44	<u>Rigging a publicly exhibited contest</u> if the defendant's conduct is in connection with betting or wagering on the contest
32.45	<u>Misapplication of fiduciary property</u> or property of a financial institution if the value of the property is more than \$200 but less than \$10,000
32.46	<u>Securing execution of a document by deception</u>
32.47	<u>Fraudulent destruction, removal or concealment of</u> (1) a will or codicil of another; or (2) a commercial instrument or other writing of which the law requires public filing

IV. THIRD-DEGREE FELONIES (cont.)

<u>Penal Code §</u>	<u>Offense</u>
36.03	<u>Coercion of a public servant or voter</u> if the coercion is a threat to commit a felony
36.05	<u>Tampering with a witness</u>
36.06	<u>Retaliation</u>
37.03	<u>Aggravated perjury</u>
37.10	<u>Tampering with governmental records</u> if done with intent to harm another
37.11	<u>Impersonating a peace officer</u>
38.03	<u>Resisting arrest</u> or <u>search</u> using a deadly weapon
38.07	<u>Escape</u> by one charged with, under arrest for, or convicted of a felony or confined in a penal institution
38.08	Permitting or <u>facilitating escape</u> if (1) the person in custody was charged with, under arrest for, or convicted of a felony or in a penal institution; or (2) if a deadly weapon was used
38.10	<u> Implements for escape</u> , i.e., giving an inmate something useful for an escape
38.11	<u>Bail jumping</u> or failure to appear if the offense for which the appearance was needed is a felony
39.01	<u>Official misconduct</u> , i.e., misuse of government property by a public official who has access to that property by virtue of employment
43.04	<u>Aggravated promotion of prostitution</u>
43.24	<u>Employing or using a minor to display or distribute obscene material to minors</u>
46.02	<u>Carrying weapons where liquor is sold</u>
46.05	<u>Possession of a firearm by a felon</u>
46.06	<u>Possession of a switchblade or knuckles</u>
47.03	<u>Gambling promotion</u>
47.04	<u>Keeping a gambling place</u>
47.05	<u>Communicating gambling information</u>
47.06	<u>Possession of gambling devices or equipment</u>

IV. THIRD-DEGREE FELONIES (cont.)

<u>C.S. §</u>	<u>Offense</u>
4.02(c) &	<u>Manufacture, delivery, or possession with intent</u>
4.03(a) &	<u>to manufacture or deliver of a specified controlled substance</u> , including certain amphetamines, mescaline, psilocybin, and T.H.C.
(b)(2)	
4.02(d) &	<u>Manufacture, delivery, or possession with intent</u>
4.03(a) &	<u>to manufacture or deliver of a specified controlled substance</u> , including barbituates, peyote, phenobarbital, phencyclidine, and specified quantities of opium, morphine, and codeine
(b)(3)	
4.02(c) &	<u>Possession of a specified controlled substance</u> ,
4.04(a) &	<u>including certain amphetamines, mescaline,</u>
(b)(2)	<u>psilocybin, and T.H.C.</u>
4.05	<u>Possession of more than four ounces of marijuana</u>
(b)(1)	
4.05(d)	<u>Marijuana sale</u>
4.05(d)	<u>Delivery of more than one-fourth ounce of marijuana</u>
3.07 &	<u>Designated fraudulent acts</u> with respect to specified
4.09(a) &	<u>barbituates</u>
(b)(2)	

HABITUAL OFFENDER STATUTES: 1776-1980

STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Alabama	pre-1841		No habitual offender statute					
	1841	1841 Acts P.C. C.8, §17, p. 250	Prison offense	1	Prison offense		One and one-fourth prior sentence	Maximum
	1852	1852 Acts P.C. Pt.4, Tit.2, C.11, §3634, p. 638	Prison offense	1	Same offense		One and one-fourth prior sentence	Maximum
	05/23/77	1977 Acts No.639, p. 1088 & prior law	Prison offense	1	Same offense		One and one-fourth prior sentence	Maximum
			Specified violent felony	1	Violent felony within 5 years		Minimum without parole	Maximum without parole
	06/01/79	1977-78 Acts No.643, p. 1091; No.770, p. 1128 & prior law	Prison offense	1	Same offense		One and one-fourth prior sentence	Maximum
			Class B or C felony	1	Felony		Minimum for next highest felony category	Maximum for next highest felony category

HABITUAL OFFENDER STATUTES: 1776-1980

STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Ala. (cont.)			Specified violent felony	1	Felony resulting in physical injury within 5 years		Minimum without parole	Maximum without parole
			Class A felony	1	Felony	15 years		Life or 99 years
Alaska	pre-03/09/39		No habitual offender statute					
	03/09/39	1939 Acts C.53, §1-2, p. 138	Felony	1	Felony			Double Maximum
			Felony	2	Felony			Quadruple Maximum
			Petty larceny or fraudulent misdemeanor	3	Specified nonviolent offense	3 years		10 years
			Felony	3	Felony	Life		

HABITUAL OFFENDER STATUTES: 1776-1980

STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Mass. (cont.)	01/01/63	1962 Acts C.34, §8.04-.05, p. 34	Felony	1	Felony			Double Maximum
			Felony	2	Felony			Quadruple Maximum
			Petty larceny or fraudulent misdemeanor	3	Specified nonviolent or semi-violent offense			10 years
			Felony	3	Felony	20 years		Life
01/01/80	1978 Acts C.166, §15, 21, 12.55.125, 12.55.145, p. 110-118	Class C felony	1	Felony within 7 years		2 years without parole		5 years without parole for 2 years
		Class B felony	1	Felony within 7 years		4 years without parole		10 years without parole for 4 years
		Class A felony	1	Felony within 7 years		10 years without parole		20 years without parole for 10 years

HABITUAL OFFENDER STATUTES: 1776-1980

STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Alas. (cont.)			Class C felony	2	Felony within 7 years		3 years without parole	5 years without parole for 3 years
			Class B felony	2	Felony within 7 years		6 years without parole	10 years without parole for 6 years
			Class A felony	2	Felony within 7 years		10 years without parole	20 years without parole for 10 years
Arizona	pre-09/01/01		No habitual offender statute					
	09/01/01	1901 Acts P.C. Tit.18, §630-31, 635, p. 1298	Petty larceny or attempted prison offense w/ term at most 5 years	1	Prison offense			5 years
			Prison offense punishable by term at most 5 years	1	Prison offense			10 years
			Prison offense	1	Petty larceny or attempted prison offense		Maximum	

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HABITUAL OFFENDER STATUTES: 1776-1980

STATE	EFFECTIVE DATE	CITE	NUMBER			PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
			PRESENT OFFENSE	OF PRIORS	PREVIOUS OFFENSES			
Ariz. (cont.)			Prison offense punishable by term greater than 5 years	1	Prison offense		10 years	Life
	10/25/13	1913 Acts P.C. Tit.20, §738, 742, p. 152	Petty larceny or attempted prison offense w/ term at most 5 years	1	Prison offense or petty larceny			5 years
			Prison offense punishable by term at most 5 years	1	Prison offense or petty larceny			10 years
			Prison offense punishable by term greater than 5 years	1	Prison offense or petty larceny		10 years	Life
	03/28/51	1951 Acts C.110, p. 260	Sex off., petty larceny, attempt offense w/ term at most 5 years	1	Prison offense, petty larceny, or specified sex offense			5 years
			Prison offense punishable by term at most 5 years	1	Prison offense, petty larceny, or specified sex offense			10 years
			Prison offense punishable by term greater than 5 years	1	Prison offense, petty larceny, or specified sex offense		10 years	Life

HABITUAL OFFENDER STATUTES: 1776-1980

STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS		PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
					OF PRIORS				
Ariz. (cont.)	07/11/69	1969 Acts C.133, §9, p.399	Specified sex or nonviolent off. or attempt w/ term at most 5	1		Prison offense or specified nonviolent or sex offense			5 years
			Prison offense punishable by term at most 5 years	1		Prison offense or specified nonviolent or sex offense			10 years
			Prison offense punishable by term greater than 5 years	1		Prison offense or specified nonviolent or sex offense		10 years	Life
10/01/78	1977 Acts C.142, §36, 48; C.201, §98,101,105-06, p.714-21	Class 4, 5, or 6 felony		1	Felony within 10 years		Minimum without parole for one-half of sentence	Double maximum without parole for one-half of sentence	
			Class 2 or 3 felony	1	Felony		Minimum without parole for two-thirds of sentence	Treble maximum without parole for two-thirds of sentence	
		Class 4, 5, or 6 armed or violent felony		1	Armed or violent felony		Double minimum without parole for two-thirds of sentence	Treble maximum without parole for two-thirds of sentence	
			Class 2 or 3 armed or violent felony	1	Class 2 or 3 armed or violent felony		Double minimum without parole for two-thirds of sentence	Quadruple maximum w/o parole for two-thirds of sentence	

HABITUAL OFFENDER STATUTES: 1776-1980

STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Ariz. (cont.)			Class 4, 5, or 6 felony	2	Felony		Double minimum without parole for two-thirds of sentence	Treble maximum without parole of two-thirds of sentence
			Class 2 or 3 felony	2	Felony		Double minimum without parole for two-thirds of sentence	Quadruple maximum w/o parole for two-third of sentence
			Class 4, 5, or 6 armed or violent felony	2	Armed or violent felony		Treble minimum without parole for two-thirds of sentence	Quadruple maximum w/o parole for two-third of sentence
			Class 2 or 3 armed or violent felony	2	Class 2 or 3 armed or violent felony		Treble minimum without parole for two-thirds of sentence	Quintuple maximum w/o parole for two-third of sentence
Arkansas	pre-03/06/53		No habitual offender statute					
	03/06/53	1953 Acts No. 228, §1, p. 692	Prison offense	1	Prison offense		Minimum plus 1 year	Life
			Prison offense	2	Prison offense		Minimum plus 2 years	Life

HABITUAL OFFENDER STATUTES: 1776-1980

STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Ark. (cont.)			Prison offense	3	Prison offense		Minimum plus 3 years	Life
	04/06/67	1967 Acts No. 639, §1, p. 1174	Prison offense	1	Prison offense		Minimum plus 1 year	Greater of minimum plus 1 year or maximum
			Prison offense	2	Prison offense		Minimum plus 3 years	Greater of minimum plus 3 years or maximum
			Prison offense	3	Prison offense		Greater of 5 years or maximum	Greater of 5 years or one and one-half maximum
	01/01/76	1975 Acts No. 280, §1001, p. 570	Class D felony	2	Felony			5 years
			Class C felony	2	Felony		2 years; judge need not apply statute	10 years
			Class B felony	2	Felony		5 years; judge need not apply statute	30 years

HABITUAL OFFENDER STATUTES: 1776-1980

STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Ark. (cont.)			Class A felony	2	Felony		10 years; judge need not apply statute	Life or 50 years
	03/17/77	1977 Acts No. 474, §4, p. 1130	Unclassified felony	2	Felony		Minimum plus 3 years; judge need not apply statute	Maximum plus 5 years
			Class D felony	2	Felony			7 years
			Class C felony	2	Felony		3 years; judge need not apply statute	15 years
			Class B felony	2	Felony		5 years; judge need not apply statute	30 years
			Felony punishable by life sentence	2	Felony		10 years; judge need not apply statute	Life or 50 years
			Class A felony	2	Felony		10 years; judge need not apply statute	Life or 50 years

HABITUAL OFFENDER STATUTES: 1776-1980

STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Ark. (cont.)			Unclassified Felony	3	Felony		Minimum plus 7 years; judge need not apply statute	Double Maximum
			Class D felony	3	Felony		5 years; judge need not apply statute	10 years
			Class C felony	3	Felony		10 years; judge need not apply statute	20 years
			Class B felony	3	Felony		20 years; judge need not apply statute	40 years
			Felony punishable by life sentence	3	Felony		25 years; judge need not apply statute	Life or 50 years
			Class A felony	3	Felony		50 years; judge need not apply statute	Life
California	pre-1872		No habitual offender statute					

HABITUAL OFFENDER STATUTES: 1776-1980

STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS		PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
					OF PRIORS				
Cal. (cont.)	1872	1871 Acts P.C. §666-67, p. 143	Petty larceny or attempted prison offense w/ term at most 5 years	1	Prison offense				5 years
			Prison offense punishable by term at most 5 years	1	Prison offense				10 years
			Prison offense	1	Petty larceny or attempted prison offense			Maximum	
			Prison offense punishable by term greater than 5 years	1	Prison offense			10 years	Life
	03/09/03	1903 Acts C.95-96, p. 107	Petty larceny	1	Prison offense or petty larceny				5 years
			Prison offense punishable by term at most 5 years	1	Prison offense or petty larceny				10 years
			Prison offense punishable by term greater than 10 years	1	Prison offense or petty larceny			10 years	Life

HABITUAL OFFENDER STATUTES: 1776-1980

STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Cal. (cont.)	03/21/05	1905 Acts C.506, p. 667	Petty larceny	1	Prison offense or petty larceny			5 years
			Prison offense punishable by term at most 5 years	1	Prison offense or petty larceny			10 years
			Prison offense punishable by term greater than 5 years	1	Prison offense or petty larceny		10 years	Life
	03/13/09	1907 Acts C.234, p. 360; C.236, p. 364	Petty larceny	1	Prison offense	Prison term		5 years
			Prison offense punishable by term at most 5 years	1	Petty larceny	Prison term		10 years
			Prison offense	1	Prison offense	Prison term	Maximum	
			Prison offense punishable by term greater than 5 years	1	Petty larceny	Prison term	10 years	Life

HABITUAL OFFENDER STATUTES: 1776-1980

STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS		PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
					PRIORS				
Cal. (cont.)	05/05/23	1923 Acts C.111, §1, p. 237 & prior law	Petty larceny	1	Prison offense	Prison term			5 years
			Prison offense punishable by term at most 5 years	1	Petty larceny	Prison term			10 years
			Prison offense	1	Prison offense	Prison term		Maximum	
			Prison offense punishable by term greater than 5 years	1	Petty larceny	Prison term	10 years		Life
			Felony	2	Specified violent or semi-violent offense		10 years		Life
			Felony	3	Specified violent or semi-violent offense		Life		
	07/29/27	1927 Acts C.634, §1, p. 1066 & prior law	Petty larceny	1	Prison offense	Prison term			5 years

HABITUAL OFFENDER STATUTES: 1776-1980

STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Cal. (cont.)			Prison offense punishable by term at most 5 years	1	Petty larceny	Prison term		10 years
			Prison offense	1	Prison offense	Prison term	Maximum	
			Prison offense punishable by term greater than 5 years	1	Petty larceny	Prison term	10 years	Life
			Felony	2	Specified offense		Life without parole for 12 years	
			Felony	3	Felony		Life without parole	
08/14/31	1931 Acts C.481-482, p. 1050		Petty theft	1	Felony			5 years
			Prison offense punishable by term at most 5 years	1	Petty larceny or petty theft	Prison term		10 years

HABITUAL OFFENDER STATUTES: 1776-1980

STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Cal. (cont.)			Prison offense punishable by term greater than 5 years	1	Petty larceny or petty theft		5 years	
			Felony	2	Specified offense	Prison term each	Life without parole for 12 years	
			Felony	3	Specified offense	Prison term each	Life without parole	
09/15/35	1935 Acts C.602-03, p. 1699; C.754, §1, p. 2121 & prior law	Petty theft	1	Felony	Prison term		5 years	
		Prison offense punishable by term at most 5 years	1	Petty larceny or petty theft	Prison term		10 years	
		Unarmed prison offense	1	Felony			5 years	
		Prison offense punishable by term greater than 5 years	1	Petty larceny or petty theft	Prison term		5 years	

HABITUAL OFFENDER STATUTES: 1776-1980

STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Cal. (cont.)			Armed prison offense	1	Felony		10 years	
			Felony	2	Specified offense	Prison term	Life w/o parole 12 years; judge can dismiss habitual count	
			Felony	3	Specified offense	Prison term	Life without parole; judge can dismiss habitual count	
09/15/45	1945 Acts C.934, p. 1747 & prior law	Petty theft	1	Felony	Prison term		5 years	
		Prison offense punishable by term at most 5 years	1	Petty larceny or petty theft	Prison term		10 years	
		Unarmed prison offense	1	Felony		5 years		
		Prison offense punishable by term greater than 5 years	1	Petty larceny or petty theft	Prison term	5 years		

HABITUAL OFFENDER STATUTES: 1776-1980

STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Cal. (cont.)			Armed prison offense	1	Felony		10 years	
			Specified violent or semi-violent offense	2	Specified offense	Prison term	Life w/o parole 15 years; judge can dismiss habitual count	
			Specified violent or semi-violent offense	3	Specified offense	Prison term	Life w/o parole 20 years; judge can dismiss habitual count	
07/01/77	1976 Acts C.1139, §268, p. 5137		Prison felony	1	Prison offense within 5 years	1 year	1 year additional for each prior	
			Specified violent felony	1	Specified violent or armed felony within 10 years	1 year	3 years additional for each prior	
Canal Zone	pre-09/10/04		No habitual offender statute					
09/10/04	1904 Acts Tit.IV, §50-53, p. 89		Prison offense punishable by term at most 5 years	1	Prison offense		10 years	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
C.Z. (cont.)			Prison offense	1	Petty larceny or attempted prison offense		Maximum	
			Prison offense punishable by term greater than 5 years	1	Prison offense		10 years	Life
			Felony	2	Felony	5 years each	15 years	
Colorado	pre-04/18/29		No habitual offender statute					
	04/18/29	1929 Acts C.85, §1-3, p. 309	Specified felony	1	Specified felony		One-third maximum	Double Maximum
			Specified felony	2	Specified felony		Maximum	Treble Maximum
			Specified felony	3	Specified felony		Life	

HABITUAL OFFENDER STATUTES: 1776-1980*

STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Colorado. (cont.)	04/09/45	1945 Acts C.114, §1, p. 310	Felony	2	Felony		Maximum	Treble Maximum
			Felony	3	Felony		Life	
	07/01/76	1976 Acts C.93, §6, p. 548	Felony punishable by term greater than 5 years	2	Felony within 10 years		25 years	50 years
			Felony	3	Felony		Life	
Connecticut	pre-1849		No habitual offender statute					
	1849	1848 Acts §178, p. 262	Prison offense	1	Prison offense			Double Maximum
	1888	1887 Acts C.114, §1, p. 734 & prior law	Prison offense	1	Prison offense			Double Maximum

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Conn. (cont.)			Prison offense punishable by term at least 2 years	2	Prison offense punishable by term at least 2 years	2 years	25 years additional	
	06/17/01	1901 Acts C.78, §1, p. 1225 & prior law	Prison offense	1	Prison offense			Double Maximum
			Prison offense	2	Prison offense	Prison term	30 years	
	07/01/02	1902 Acts Tit.7, §1530, 1535-36, p. 417-19	Prison offense	1	Prison offense	Prison term		Double Maximum
			Prison offense	2	Prison offense	Prison term each		30 years
			Prison offense with sentence at least 1 year	2	Prison offense	1 year each	25 years additional	
	01/15/49	1948 Acts Tit.65, C.429, §8820, 8825, p. 3182	Prison offense	1	Prison offense	Prison term		Double Maximum

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Conn. (cont.)			Prison offense	2	Prison offense	Prison term each		30 years
	06/26/69	1969 Acts No. 605, p. 766	Specified armed offense or attempted offense	1	Specified armed offense or attempted offense		1 year additional	5 years additional
			Specified armed offense or attempted offense	1	Specified armed offense or attempted offense		10 years additional	Life
			Specified armed offense or attempted offense	2	Specified armed offense or attempted offense		5 years additional	Life
	10/01/71	1969 Acts No. 828, §35, 40, p. 1567-70	Class D felony	2	Prison offense	1 year		10 years without parole for 5 years
			Class C felony	2	Prison offense	1 year		20 years without parole for 10 years
			Class B felony	2	Prison offense	1 year		Life without parole for 25 years

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Conn. (cont.)			Specified violent offense	2	Specified violent prison offense	1 year		Life without parole for 25 years
Delaware	pre-07/15/53		No habitual offender statute					
	07/15/53	1953 Acts C.5, §1, p. 10; V.58, C.413, §1, p. 837	Drug offense	1	Drug offense		5 years	10 years and \$3,000 fine
			Drug offense	2	Drug offense		10 years	20 years and \$3,000 fine
			Felony	3	Felony			Life
	06/22/70	C.585, §1, p. 1731, 1765	Specified violent or semi-violent felony	2	Specified violent or semi-violent felony		Life without parole	
		C.585, §1, p. 1731	Felony	3	Felony other than specified violent or semi-violent felony			Life

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HABITUAL OFFENDER STATUTES: 1776-1980

STATE	EFFECTIVE DATE	CITE	NUMBER			PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
			PRESENT OFFENSE	OF PRIORS	PREVIOUS OFFENSES			
District of Columbia	pre-01/01/02		No habitual offender statute					
	01/01/02	1901 Acts No. 159, C.19, subch.8, §907, p.164	Any offense	1	Any offense			One and one-half maximum
	02/01/71	1970 Acts No. 91-358, Tit.II, §201, p. 701, 84 Stat.599	Any offense	1	Any offense			One and one-half maximum
			Any offense	2	Any offense			Treble Maximum
			Felony	2	Felony			Life
Florida	pre-06/03/27		No habitual offender statute					
	06/03/27	1927 Acts C.12022, No. 217, §1-2, p. 621	Felony	1	Felony or attempted felony		Maximum	Double Maximum

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
a. (cont.)			Felony	3	Felony or attempted felony		Life	
	01/01/72	1971 Acts C.71-136, §5-6, p. 555	Third degree felony	1	Felony within 5 years		10 years	
			Second degree felony	1	Felony within 5 years			30 years
			First degree felony	1	Felony within 5 years			Life
	07/01/75	1974 Acts C.74-383, §7, p. 1228	Third degree felony	1	Felony within 5 years			10 years
			Second degree felony	1	Felony within 5 years			30 years
			First degree felony	1	Felony within 5 years			Life

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS		PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
					PRIORS				
La. (cont.)			Third degree felony	2		Prison offense punishable by term exceeding 1 yr w/in 5 yrs			10 years
			Second degree felony	2		Prison offense punishable by term exceeding 1 yr w/in 5 yrs			30 years
			First degree felony	2		Prison offense punishable by term exceeding 1 yr w/in 5 yrs			Life
Georgia	pre-1833		No habitual offender statute						
	1833	1833 Acts P.C. §46, p. 840	Prison offense	1		Prison offense	Prison term	Maximum	
	12/21/53	1953 Acts No. 730, p. 289 & prior law	Prison offense	1		Prison offense	Prison term	Maximum	
			Felony	3		Felony		Maximum without parole	

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STATE	EFFECTIVE DATE	CITE	PRES ^N ENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Hawaii	pre-01/01/73		No habitual offender statute					
	01/01/73	1972 Acts No. 9, §§661-62, p. 80	Class C felony	2	Felony			10 years
			Class B felony	2	Felony			20 years
			Class A felony	2	Felony			Life
	06/01/76	1976 Acts No. 181, §706, p. 338; No. 204, p. 493 & prior law	Specified violent or dangerous drug offense	1	Same offense		5 years without parole	
			Class A or B armed felony	1	Armed felony		10 years without parole	Life
			Class C felony	2	Felony			10 years

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STATE	EFFECTIVE DATE	CITE	PRES ^N ENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONAR ^M AXIMUM
Hawaii (cont.)			Class B felony	2	Felony			20 years
			Specified violent or dangerous drug offense	2	Same offense		10 years without parole	
			Class A felony	2	Felony			Life
Idaho	pre-03/09/23		No habitual offender statute					
	03/09/23	1923 Acts No. 109, p. 139	Felony	2	Felony		5 years	Life
Illinois	pre-1883		No habitual offender statute					
	1883	1883 Acts p. 76	Specified felony	1	Specified felony		Maximum	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Ill. (cont.)			Specified felony	2	Specified felony		15 years	Life
	01/01/62	1961 Acts p. 1983, 2028, §24-1	Specified armed offense	1	Felony within 5 years		1 year	10 years
	08/03/67	1967 Acts S.B.18, §1, Pt.F, §33A-1, p. 2595 & prior law	Specified armed offense	1	Felony within 5 years		1 year	10 years
			Specified armed felony	1	Specified armed felony		5 years	Life
			Specified armed offense	1	Specified armed offense		5 years	Life
	08/24/71	1971 Acts No.77-1233, p. 2204 & prior law	Specified armed offense	1	Felony within 5 years		1 year	10 years
			Specified armed felony	1	Specified armed felony		8 years	Life

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Ill. (cont.)	01/01/73	1972 Acts No.77-2638, §33A-3; No.77- 2097, §5-8-1 & prior law	Specified armed offense	1	Felony within 5 years		1 year	10 years
			Specified armed felony	1	Specified armed felony		4 years	Life
	02/01/78	1977 Acts No.80-1099, p. 3268-70, 3298, 3301, 3308-10	Specified armed offense	1	Specified armed offense within 5 years		1 year	6 years
			Specified armed felony	1	Felony within 5 years		2 years	10 years
			Class 1 or 2 felony	2	Class 1 or 2 felony		6 years	30 years
			Specified violent felony	2	Specified violent felony		Life without parole	
Indiana	pre-04/10/07	No habitual offender statute						

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Ind. (cont.)	04/10/07	1907 Acts C. 82, §1, p. 109	Felony	2	Felony -	Prison term	Life	
	10/01/77	1977 Acts No. 340, §121, p. 1533, 1594	Felony or prison offense punishable by term greater than 1yr	2	Felony or prison offense punishable by term greater than 1yr		30 years additional	
Iowa	pre-1898		No habitual offender statute					
	1898	1898 Acts C.109, §1, p. 58	Specified felony	2	Specified felony		15 years	Life
	04/09/02	1902 Acts C.152, §1, p. 110 & prior law	Specified felony	2	Specified felony		15 years	
			Felony	2	Prison offense	3 years each	25 years	
	04/13/21	1921 Acts C.231, §16-17, p. 262	Felony	2	Prison offense	3 years each		Greater of 25 years or maximum

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Iowa (cont.)			Specified felony	2	Specified felony			40 years
	01/01/78	1976 Acts C.1245, Div.2, §208-09, p. 659 & prior law	Class C or D felony	2	Felony		Greater of 3 yrs or minimum, without parole for 3 years	15 years without parole for 3 years
			Specified felony	2	Specified felony	3 years each		40 years
Kansas	pre-1855		No habitual offender statute					
	1855	1855 Acts C.54, §7, p. 293	Petty larceny or attempted prison offense	1	Prison offense, petty larceny, or attempted prison offense			5 years
			Prison offense	1	Prison offense, petty larceny, or attempted prison offense		Maximum	
	1868	1868 Acts C.31, §289, 291, p. 380-81	Attempted prison offense	1	Prison offense			5 years

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Kan. (cont.)			Prison offense	1	Prison offense		Maximum	
	06/01/27	1927 Acts C.191, §1, p. 247 & prior law	Attempted prison offense	1	Prison offense			5 years
			Prison offense	1	Prison offense or attempted prison offense		Maximum	
			Prison felony	1	Prison felony		Double prior sentence	Life
			Felony	2	Felony		Life	
	06/30/37	1937 Acts C.209, §1, p. 300 & prior law	Prison felony	1	Prison felony		Double prior sentence	Life
			Felony	2	Felony		Life	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS		PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
				1	2				
Kan. (cont.)	06/30/39	1939 Acts C.178, §1, p. 299 & prior law	Prison felony	1	Prison felony			Double Maximum	Life
			Felony	2	Felony			15 years	Life
Kentucky	07/01/70	1969 Acts C.180, §21-4504, p. 495; C.124, §10, p. 464	Prison felony	1	Felony	Minimum without parole		Double maximum without parole for double the minimum	
			Felony	2	Felony	Maximum without parole for the minimum		Life without parole for treble the minimum	
Kentucky	01/01/79	1978 Acts C.120, §4, p. 539	Prison felony	1	Prison felony			Double Maximum	
			Felony	2	Felony			Treble Maximum	
Kentucky	pre-1881		No habitual offender statute						

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Ky. (cont.)	1881	1881 Acts C.29, Art.1, §12, p. 318	Prison felony	1	Prison felony		Double prior sentence	
			Felony	2	Felony		Life	
	01/01/75	1974 Acts C.406, §280, p. 873	Class C or D felony	2	Felony	1 year	10 years	20 years
			Class B felony	2	Felony	1 year	20 years	Life
			Class A felony	2	Felony	1 year	Life	
	03/29/76	1976 Acts C.180, §1, p. 425	Felony	1	Felony within 5 years	1 year	Next highest felony category without parole	
			Class C or D felony	2	Felony within 5 years	1 year	10 years without parole	20 years without parole for 10 years

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Tenn. (cont.)			Class A or B felony	2	Felony within 5 years	1 year	20 years without parole for 10 years	Life without parole for 10 years
Louisiana	pre-1855		No habitual offender statute					
	1855	1855 Acts No. 120, §118, p. 149	Any offense	1	Any offense			Double Maximum
			Any offense	2	Any offense			Treble Maximum
			Any offense	3	Any offense			Life
	07/07/28	1928 Acts No. 15, §1-2, p. 17	Felony	1	Felony or attempted felony		Maximum	Double Maximum
			Felony	2	Felony or attempted felony		Maximum	Quadruple Maximum

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
a. (cont.)			Felony	3	Felony or attempted felony		Life	
	07/07/42	1942 Acts No. 45, §1-2, p. 142	Felony	1	Felony within 5 years		One-third maximum	Double Maximum
			Felony	2	Felony within 5 years		One-half maximum	Double Maximum
			Felony	3	Felony within 5 years		Greater of 20 years or maximum	Life
	09/08/78	1978 Acts No. 424, §1, p. 1057 & prior law	Felony	1	Felony within 5 years		One-third maximum	Double Maximum
			Felony	2	Felony within 5 years		One-half maximum	Double Maximum
			Felony	2	Violent felony or felony punishable by term exceeding 12 yrs		Life without parole	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
La. (cont.)			Felony	3	Felony within 5 years		Greater of 20 years or maximum	Life
			Felony	3	1 felony & 2 felonies violent or carrying more than 12 yr term		Life without parole	
Maine	pre-1824		No habitual offender statute					
	1824	1824 Acts C.282, §18, p. 118	Prison offense	1	Prison offense	Prison term		Life
	03/01/76	1975 Acts C.499, §2, p. 1273	No habitual offender statute					
Maryland	pre-07/01/75		No habitual offender statute					
	07/01/75	1975 Acts C.253, p. 1254	Specified violent offense or attempted offense	3	Specified violent offense or attempted offense		Life without parole	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Id. (cont.)	07/01/77	1977 Acts C.678, §1, p. 2724	Specified violent offense or attempted offense	2	Specified violent offense or attempted offense	1 prison term	25 years	
			Specified violent offense or attempted offense	3	Specified violent offense or attempted offense	Prison term each	Life without parole	
Massachusetts	pre-1818		No habitual offender statute					
	1818	1817 Acts C.176, §5, 6, p. 447	Prison offense	1	Prison offense	Prison term		7 years additional plus 30 day solitary confinement
			Prison offense	2	Prison offense	Prison term	Life plus 30 days solitary confinement	
	1833	1833 Acts C.85, p. 618	Prison offense with sentence at least 1 year	1	Prison offense	1 year		7 years additional
			Prison offense	2	Prison offense	1 year each	7 years additional	Life

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS		PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
				1	2				
Mass. (cont.)	1843	1843 Acts C.80, §1, p. 44 & prior law	Prison offense with sentence at least 1 year	1	Prison offense	1 year			3 years additional
			Prison offense	2	Prison offense	1 year each		7 years additional	
	1853	1853 Acts C.375, p. 596	No habitual offender statute						
	1887	1887 Acts C.435, §1, p. 1098	Felony	2	Prison offense	3 years each		25 years	
	05/06/04	1904 Acts C.303, §21, p. 252	Felony	2	Prison offense	3 years each		Maximum	
Michigan	pre-1846		No habitual offender statute						
	1846	1846 Acts Tit.30, C.161, §12-13, p. 688	Prison offense with sentence at least 1 year	1	Prison offense	1 year			7 years additional

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Mich. (cont.)			Prison offense	2	Prison offense	1 year each	7 years additional	Life
	09/05/27	1927 Acts No. 175, C.9, §10-12, p. 324	Felony or attempted felony	1	Felony or attempted felony		One-half maximum	One and one-half maximum
			Felony or attempted felony	2	Felony or attempted felony		Maximum	Double Maximum
			Felony	3	Felony or attempted felony		Life	
	04/02/29	1929 Acts No. 24, C.9, §10-12, p. 52-53	Felony	1	Felony or attempted felony		One-half maximum	One and one-half maximum
			Felony	2	Felony or attempted felony		Maximum	Double Maximum
			Felony punishable by term less than 5 years	3	Felony		7-1/2 years	15 years

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Mich. (cont.)			Felony punishable by term at least 5 years	3	Felony		Life	
	09/23/49	1949 Acts No. 56, §1. p. 52	Felony	1	Felony or attempted felony			One and one-half maximum
			Felony	2	Felony or attempted felony			Double Maximum
			Felony punishable by term less than 5 years	3	Felony or attempted felony			15 years
			Felony punishable by term at least 5 years	3	Felony or attempted felony			Life
	04/01/72	1971 Acts No. 196, C.4, §335.348, p. 625 & prior law	Felony	1	Felony or attempted felony			One and one-half maximum
			Felony	2	Felony or attempted felony			Double Maximum

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STATE	EFFECTIVE DATE	CITE	PRES ^N ENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Michigan. (cont.)			Specified drug offense	1	Specified drug offense			Double Maximum
			Felony punishable by term less than 5 years	3	Felony or attempted felony			15 years
			Felony punishable by term at least 5 years	3	Felony or attempted felony			Life
Minnesota	pre-1886		No habitual offender statute					
	1886	1886 Acts P.C. Tit.18, §517, p. 199	Felony, attempted felony, or petty larceny	1	Prison offense		Maximum	Double Maximum
	03/01/06	1905 Acts C.93, §4772, p. 1014	Felony or attempted felony	1	Prison offense		Maximum	Double Maximum
	04/16/27	1927 Acts C.236, §1-2, p. 337	Felony or attempted felony	1	Felony or attempted felony		Double Minimum	Double Maximum

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Minn. (cont.)			Felony or attempted felony	3	Felony or attempted felony		Double Minimum	Life
	09/01/63	1963 Acts C.753, Art.I, §609.155, p. 1196	Felony	1	Felony within 10 years			Lesser of 40 or maximum time number of prior felonies
	08/01/75	1975 Acts C.374, §3-7, p. 1245-49 & prior law	Specified violent offense	1	Specified violent offense within 15 years		3 years	
			Felony	1	Felony within 10 years			Lesser of 40 or maximum time number of prior felonies
	05/01/80	1978 Acts C.723, Art.I, §16, 19, p. 770	Specified violent offense	1	Specified violent offense		3 years	
Mississippi	pre-1848		No habitual offender statute					
	1848	1848 Acts C.64, No.8, p. 981	Attempted prison offense or petty larceny	1	Prison offense			5 years

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Miss. (cont.)			Prison offense punishable by term at most 5 years	1	Prison offense			10 years
			Prison offense punishable by term greater than 5 years	1	Prison offense		10 years	Life
1857		1857 Acts P.C.	No habitual offender statute					
01/01/77		1976 Acts C.470, §1-2, p.772	Felony	2	Felony	1 year each	Maximum without parole	
			Felony	2	Felony; if #1 is nonviolent, then at least 1 violent felony	1 year each	Life without parole	
Missouri	pre-1825		No habitual offender statute					
1825		1825 Acts §95, p. 311	Prison offense	1	Prison offense		Double Maximum	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
o. (cont.)			Prison offense	2	Prison offense			Treble Maximum
1879	1879 Acts C.24, §1664, p. 286		Attempted prison offense or petty larceny	1	Prison offense, petty larceny, or attempted prison offense			5 years
			Prison offense	1	Prison offense, petty larceny, or attempted prison offense		Maximum	
1895	1895 Acts p. 153		Attempted prison offense	1	Prison offense or attempted prison offense			5 years
			Prison offense	1	Prison offense or attempted prison offense		Maximum	
04/06/27	1927 Acts p. 173 & prior law		Attempted prison offense	1	Prison offense or attempted prison offense			5 years
			Prison offense	1	Prison offense or attempted prison offense		Maximum	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
o. (cont.)			Armed felony or attempted felony	1	Armed felony or attempted felony		10 years additional	
			Armed felony or attempted felony	2	Armed felony or attempted felony		15 years additional	
			Armed felony or attempted felony	3	Armed felony or attempted felony		Life	
06/15/59	1959 Acts S.B. No.117 & prior law		Armed felony or attempted felony	1	Armed felony or attempted felony		10 years additional	
			Armed felony or attempted felony	2	Armed felony or attempted felony		15 years additional	
			Armed felony or attempted felony	3	Armed felony or attempted felony		Life	
06/24/76	1976 Acts p. 780	Armed felony	2	Armed felony		5 years additional without parole for 5 years	Life	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Mo. (cont.)			Armed felony	3	Armed felony		10 years additional without parole for 10 years	Life
	01/01/79	1977 Acts S.B. No. 60, §1, §§558.016, p. 670, §571.015, p. 700	Class D felony	1	Class A or B or dangerous felony			10 years
			Class C felony	1	Class A or B or dangerous felony			15 years
			Class B felony	1	Class A or B or dangerous felony			30 years
			Armed felony	1	Armed felony		5 years additional without parole for 5 years	Life without parole for 5 years
			Class D felony	2	Felony			10 years
			Class C felony	2	Felony			15 years

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
o. (cont.)			Class B felony	2	Felony			30 years
			Armed felony	2	Armed felony		10 years additional without parole for 10 years	Life without parole for 10 years
Montana	pre-1895		No habitual offender statute					
	1895	1895 Acts P.C. Tit. 16, §1232-33, p. 939	Petty larceny or attempted prison offense	1	Petty larceny or attempted prison offense			5 years
			Petty larceny or attempted prison offense w/ term at most 5 years	1	Prison offense			5 years
			Prison offense	1	Petty larceny or attempted prison offense		Maximum	
			Prison offense punishable by term greater than 5 years	1	Prison offense		10 years	Life

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Mont. (cont.)	01/01/74	1973 Acts C.513, §5, p. 1399	Felony	1	Prison felony w/in 5 yrs pun- ishable by term exceeding 1 year	1 year	5 years	100 years
Nebraska	pre-04/25/21		No habitual offender statute					
	04/25/21	1921 Acts C.131, §1, p. 543	Felony	2	Prison offense	1 year each	Greater of 10 years or minimum	Life
	03/12/37	1937 Acts C.68, §1, p. 251	Felony	2	Prison offense	1 year each	10 years	Greater of 20 years or maximum
	10/22/67	1967 Acts C.179, §1, p. 497	Felony	2	Prison offense	1 year each	10 years	Greater of 60 years or maximum
Nevada	pre-01/01/12		No habitual offender statute					
	01/01/12	1911 Acts C.7, §6292, p.1811	Felony, petty larceny, or fraud-type offense	2	Felony		10 years	Life

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
			Felony, petty larceny, or fraud-type offense	3	Petty larceny or fraudulent misdemeanor		10 years	Life
			Felony, petty larceny, or fraud-type offense	3	Felony		Life	
			Felony, petty larceny, or fraud-type offense	5	Petty larceny or fraudulent misdemeanor		Life	
07/01/67	1965 Acts C.211, §209, p. 516		Felony, petty larceny, or fraud-type offense	2	Felony		10 years	Life
			Felony, petty larceny, or fraud-type offense	3	Petty larceny or fraudulent misdemeanor		10 years	Life
			Felony, petty larceny, or fraud-type offense	3	Felony		Life; judge can dismiss habitual count	
			Felony, petty larceny, or fraud-type offense	5	Petty larceny or fraudulent misdemeanor		Life; judge can dismiss habitual count	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS		PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
				OF	PRIORS				
Nev. (cont.)	03/31/71	1971 Acts C.123, §1, p. 173	Felony, petty larceny, or fraud-type offense	2	Felony			10 years	20 years
			Felony, petty larceny, or fraud-type offense	3	Petty larceny or fraudulent misdemeanor			10 years	20 years
			Felony, petty larceny, or fraud-type offense	3	Felony			Life; judge can dismiss habitual count	
			Felony, petty larceny, or fraud-type offense	5	Petty larceny or fraudulent misdemeanor			Life; judge can dismiss habitual count	
	04/18/77	1977 Acts C.193, p. 360	Felony, petty larceny, or fraud-type offense	2	Felony			10 years	20 years
			Felony, petty larceny, or fraud-type offense	3	Petty larceny or fraudulent misdemeanor			10 years	20 years
			Felony, petty larceny, or fraud-type offense	3	Felony			Life w/o parole 10 years; judge can dismiss habitual count	Life without parole; judge can dismiss habitual count

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
ev. (cont.)			Felony, petty larceny, or fraud-type offense	5	Petty larceny or fraudulent misdemeanor		Life w/o parole 10 years; judge can dismiss habitual count	Life without parole; judge can dismiss habitual count
New Hampshire	pre-1893		No habitual offender statute					
	1893	1893 Acts C.79, §1, p. 66	Felony	2	Prison offense	3 years each		15 years
	11/01/73	1971 Acts C.518, §651:6, p. 692	Felony	2	Prison offense	1 year each	10 years	30 years
ew Jersey	pre-03/28/27		No habitual offender statute					
	03/28/27	1927 Acts C.218, p. 412; C.263, p. 483	Prison offense	1	Prison offense		Added commutation time earned for first sentence	
			Prison offense	2	Prison offense	Prison term	Added commutation time earned for second sentence w/o parole	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
J. (cont.)			Prison offense	3	Prison offense			Life
	11/19/40	1940 Acts C.219, §1-3, p. 889	Any offense	1	High misdemeanor			Double Maximum
			High misdemeanor or misdemeanor	2	High misdemeanor			Treble maximum w/o parole plus all prior earn commutation ti
			Any offense	3	High misdemeanor		Life	
	07/06/50	1950 Acts C.315, §1, 4, p. 1072 & prior law	Any offense	1	High misdemeanor			Double Maximum
			Any offense	2	High misdemeanor			Treble Maximum without parole
			Any offense	3	High misdemeanor		Life	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
J. (cont.)	05/22/53	1953 Acts C.166, §1-2, p. 1426	High misdemeanor or misdemeanor	1	High misdemeanor			Double Maximum
			High misdemeanor or misdemeanor	2	High misdemeanor			Treble Maximum
			High misdemeanor or misdemeanor	3	High misdemeanor			Life
	09/01/79	1978 Acts Ch.95, §2C:44-1 to -4, p. 448-50	No habitual offender statute					
ew Mexico	pre-03/11/29		No habitual offender statute					
	03/11/29	1929 Acts C.58, p. 83	Felony	1	Felony		One-half maximum	Double Maximum
			Felony	2	Felony		Maximum	Treble Maximum

08/04/79

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
N.M. (cont.)			Felony	3	Felony		Life	
	07/01/79	1977 Acts C.216, §6, p. 727	Felony	1	Prison felony punishable by term at least 1 year		1 year additional	
			Felony	2	Prison felony punishable by term at least 1 year		2 years additional	
			Felony	3	Prison felony punishable by term at least 1 year		4 years additional	
New York	pre-1796		No habitual offender statute					
	1796	1796 Acts C.30, p. 669	Felony above petty larceny unless punish- able by death	1	Felony above petty larceny unless punish- able by death		Life	
	1881	1881 Acts P.C. §688-90, 696, p. 181	Felony	1	Misdemeanor		Maximum	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
N.Y. (cont.)			Prison offense	1	Felony, attempted felony, or petty larceny		Maximum ?	Double Maximum
	09/01/07	1907 Acts C.645, p. 1494 & prior law	<i>Felony</i>	1	Misdemeanor		Maximum	
			Prison offense	1	Felony, attempted felony, or petty larceny		Maximum	Double Maximum
			<i>Felony</i>	3	Felony or attempted felony		Life	
	09/01/20	1920 Acts C.571, p. 1444 & prior law	<i>Felony</i>	1	Felony or attempted felony		Maximum	Double Maximum
			<i>Felony</i>	3	Felony		Life	
	04/04/32	1932 Acts C.617, §1, p. 1312 & prior law	<i>Felony</i>	1	Felony		Maximum	Double Maximum

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
N.Y. (cont.)			Felony except murder or treason	3	Felony except murder or treason		Greater of 15 years or maximum	Life
	05/08/42	1942 Acts C.700, §1, p. 1583 & prior law	Felony punishable by term at most 5 years	1	Felony or attempted felony		2 years	
			Felony punishable by term greater than 5 years	1	Felony		Greater of 5 years or one-half maximum	Double Maximum
			Felony except murder or treason	3	Felony except murder or treason		Greater of 15 years or maximum	Life
	03/30/50	1950 Acts C.300, §1, p. 979 & prior law	Felony or attempted felony	1	Felony		One-half maximum	Double Maximum
			Felony except murder or treason	3	Felony except murder or treason		15 years	Life
	02/19/52	1952 Acts C.22, p. 36 & prior law	Felony or attempted felony	1	Felony or attempted felony		One-half maximum	Double Maximum

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
N.Y. (cont.)			Drug felony	2	Drug felony		15 years	Life
			Felony except murder or treason	3	Felony except murder or treason		15 years	Life
07/20/65	1965 Acts C.1030, §70.00, 70.10, p. 2366-67		Felony	2	Prison felony	1 year each		Life without parole for 25 years
09/01/73	1973 Acts C.277, §9, p. 397; C.1051, §4, p. 1994		Class E felony	1	Prison felony w/in 10 yrs punishable by term exceeding 1 yr		3 years without parole for 1-1/2 years	4 years without parole for 2 years
			Class D felony	1	Prison felony w/in 10 yrs punishable by term exceeding 1 yr		4 years without parole for 2 years	7 years without parole for 3-1/2 years
			Class C felony	1	Prison felony w/in 10 yrs punishable by term exceeding 1 yr		6 years without parole for 3 years	15 years without parole for 7-1/2 years
			Class B felony	1	Prison felony w/in 10 yrs punishable by term exceeding 1 yr		9 years without parole for 4-1/2 years	25 years without parole for 12-1/2 years

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Y. (cont.)			Felony	2	Prison felony w/in 10 yrs punishable by term exceeding 1 yr			Life without parole for 25 years
09/01/78	1978 Acts C.481, §3-7, p. 67		Specified nonviolent felony Class E	1	Nonviolent felony w/in 10 yrs punishable by term exceeding 1 yr	3 years without parole for 1-1/2 years	4 years without parole for 2 years	
			Specified nonviolent felony Class D	1	Nonviolent felony w/in 10 yrs punishable by term exceeding 1 yr	4 years without parole for 2 years	7 years without parole for 3-1/2 years	
			Specified nonviolent felony Class C	1	Nonviolent felony w/in 10 yrs punishable by term exceeding 1 yr	6 years without parole for 3 years	15 years without parole for 7-1/2 years	
			Specified nonviolent felony Class B	1	Nonviolent felony w/in 10 yrs punishable by term exceeding 1 yr	9 years without parole for 4-1/2 years	25 years without parole for 12-1/2 years	
			Specified violent felony Class D	1	Violent felony w/in 10 yrs punishable by term exceeding 1 yr	5 years without parole for 2-1/2 years	7 years without parole for 3-1/2 years	
			Specified violent felony Class C	1	Violent felony w/in 10 yrs punishable by term exceeding 1 yr	8 years without parole for 4 years	15 years without parole for 7-1/2 years	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Y. (cont.)			Specified violent felony Class B	1	Violent felony w/in 10 yrs punishable by term exceeding 1 yr		12 years without parole for 6 years	25 years without parole for 12-1/2 years
			Specified nonviolent felony	2	Nonviolent felony w/in 10 yrs punishable by term exceeding 1 yr			Life without parole for 25 years
			Specified violent felony Class D	2	Violent felony w/in 10 yrs punishable by term exceeding 1 yr		Life without parole for 6 years	Life without parole for 25 years
			Specified violent felony Class C	2	Violent felony w/in 10 yrs punishable by term exceeding 1 yr		Life without parole for 8 years	Life without parole for 25 years
			Specified violent felony Class B	2	Violent felony w/in 10 yrs punishable by term exceeding 1 yr		Life without parole for 10 years	Life without parole for 25 years
North Carolina	pre-07/06/67		No habitual offender statute					
	07/06/67	1967 Acts C.1241, §1, 6, p. 1872	Felony	3	Felony		20 years without parole for 15 years	Life without parole for 30 years

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
North Dakota	pre-1877		No habitual offender statute					
	1877	1877 Acts P.C. C.58, §754, 756, p. 798	Petty larceny or attempted prison offense	1	Prison offense, petty larceny, or attempted prison offense			5 years
			Prison offense punishable by term at most 5 years	1	Prison offense			10 years
			Prison offense	1	Petty larceny or attempted prison offense		Maximum	
			Prison offense punishable by term greater than 5 years	1	Prison offense		10 years	Life
	1899	1899 Acts P.C. C.73, §7696, 7698, p. 1539	Petty larceny or attempted prison offense	1	Petty larceny or attempted prison offense			5 years
			Petty larceny or attempted prison offense	1	Prison offense		1 year	5 years

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
.D. (cont.)			Prison offense punishable by term at most 5 years	1	Prison offense			10 years
			Prison offense	1	Petty larceny or attempted prison offense		Maximum	
			Prison offense punishable by term greater than 5 years	1	Prison offense		10 years	Life
03/07/27	1927 Acts C.126, §1-2, 4, p. 157		Felony involving moral turpitude	2	Felony involving moral turpitude			Double Maximum
			Felony involving moral turpitude	3	Felony involving moral turpitude			Life
07/01/75	1973 Acts C.116, §31, §12.1-32-09, p. 293		Violent felony	1	Violent felony			Life
			Class C felony	2	Class A or B felony			10 years

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
N.D. (cont.)			Class B felony	2	Class A or B felony			20 years
			Class A felony	2	Class A or B felony			Life
			Class C felony	3	1 Class B felony & 2 prison offenses below Class B felony			10 years
			Class B felony	3	1 Class B felony & 2 prison offenses below Class B felony			20 years
			Class A felony	3	1 Class B felony & 2 prison offenses below Class B felony			Life
Ohio	pre-1885		No habitual offender statute					
1885		1885 Acts H.B.No. 751, §2, p. 236	Prison felony	2	Prison felony	Prison term each	Life	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Ohio (cont.)	04/03/29	1929 Acts H.B.No.8, §1-2, p. 40	Specified felony	2	Specified felony		Maximum	
			Specified felony	3	Specified felony		Life	
	01/01/74	1972 Acts No.511, §1-2, §2929.01, 2929.11-12, p. 1976-82	No habitual offender statute					
Oklahoma	pre-1890		No habitual offender statute					
	1890	1890 Acts P.C. C.25, §12, 14, p. 517	Petty larceny or attempted prison offense	1	Prison offense, petty larceny, or attempted prison offense			5 years
			Prison offense punishable by term at most 5 years	1	Prison offense			10 years
			Prison offense	1	Petty larceny or attempted prison offense		Maximum	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Oklahoma. (cont.)			Prison offense punishable by term greater than 5 years	1	Prison offense		10 years	Life
	06/18/63	1963 Acts C.283, §1, p. 403	Petty larceny or attempted prison offense	1	Prison offense		5 years	
			Prison offense punishable by term at most 5 years	1	Prison offense		10 years	
			Prison offense punishable by term greater than 5 years	1	Prison offense			Life
	04/15/68	1968 Acts C.179, §1, p. 275	Petty larceny or attempted prison offense	1	Prison offense		5 years	
			Prison offense punishable by term at most 5 years	1	Prison offense		10 years	
			Prison offense punishable by term greater than 5 years	1	Prison offense		10 years	Life

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Okla. (cont.)	10/01/75	1975 Acts C.64, §1, p. 103	Petty larceny or attempted prison offense	1	Prison offense within 10 years			5 years
			Prison offense punishable by term at most 5 years	1	Prison offense within 10 years			10 years
			Prison offense punishable by term greater than 5 years	1	Prison offense within 10 years		10 years	Life
	05/10/76	1976 Acts C.94, §1, p. 134 & prior law	Petty larceny or attempted prison offense	1	Prison offense within 10 years			5 years
			Prison offense punishable by term at most 5 years	1	Prison offense within 10 years			10 years
			Prison offense punishable by term greater than 5 years	1	Prison offense within 10 years		10 years	Life
			Felony	2	Felony within 10 years			Maximum plus 20 years additional

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Oklahoma. (cont.)	10/01/78	1978 Acts C.281, §1, p. 796 & prior law	Petty larceny or attempted prison offense	1	Prison offense within 10 years			5 years
			Prison offense punishable by term at most 5 years	1	Prison offense within 10 years			10 years
			Prison offense punishable by term greater than 5 years	1	Prison offense within 10 years		10 years	Life
			Felony	2	Felony within 10 years		20 years	Life
Oregon	pre-02/14/21		No habitual offender statute					
	02/14/21	1921 Acts C.70, §1, p. 97	Prison felony	2	Prison felony		Life	
	03/03/27	1927 Acts C.334, §1-3, p. 432	Felony	1	Felony or attempted felony		Maximum	Double Maximum

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
			Felony	2	Felony or attempted felony		Double Maximum	Quadruple Maximum
			Felony	3	Felony or attempted felony		Life	
	07/05/47	1947 Acts C.585, §1-2, p. 1101	Felony	1	Felony within 5 years		Double Maximum	
			Felony	3	Felony or attempted felony		Double Maximum	Life
	07/21/53	1953 Acts C.641, §7, p. 1178 & prior law	Felony	1	Felony within 5 years		Double Maximum	
			Specified violent offense	1	Specified violent offense		Life	
			Felony	3	Felony or attempted felony		Double Maximum	Life

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Dr. (cont.)	05/31/61	1961 Acts C.648, §7, p. 1306	Felony	1	Felony			Double Maximum
			Felony	2	Felony			Treble Maximum
			Felony	3	Felony		Double Maximum	Life
06/06/67	1967 Acts C.358, §1, p.480 & prior law		Felony	1	Felony			Double Maximum
			Specified violent offense	1	Specified violent offense OSV			Life
			Felony	2	Felony			Treble Maximum
			Felony	3	Felony			Life

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Ar. (cont.)	08/22/69	1969 Acts P.C. §166.230 & prior law	Felony	1	Felony			Double Maximum
			Armed felony or attempted felony	1	Armed felony or attempted felony			15 years additional
			Specified violent felony	1	Specified violent felony			Life
			Felony	2	Felony			Treble Maximum
			Armed felony or attempted felony	2	Armed felony or attempted felony			25 years additional
			Felony	3	Felony			Life
			Armed felony or attempted felony	3	Armed felony or attempted felony			Life

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STATE	EFFECTIVE DATE	CITE	PRES ^T OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Florida (cont.)	01/01/72	1971 Acts C.743, §§85, 432, p. 1901, 2002 & prior law	Armed felony or attempted felony	1	Armed felony or attempted felony			15 years additional
			Violent felony	1	Felony within 7 years			30 years
			Armed felony or attempted felony	2	Armed felony or attempted felony			25 years additional
			Armed felony or attempted felony	3	Armed felony or attempted felony			Life
Pennsylvania	pre-1860		No habitual offender statute					
	1860	1860 Acts No. 374, §182, p. 426	Prison offense	1	Prison offense			Double Maximum
	05/10/09	1909 Acts No. 275, §6, p. 495	Prison offense	2	Prison offense	1 year each	30 years without parole	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
a. (cont.)	04/29/29	1929 Acts No. 373, §1-2, p. 854	Specified drug, violent, semi- violent, or sex offense	1	Specified drug, violent, semi- violent, or sex offense in 5 yrs			Double Maximum
			Specified drug, violent, semi- violent, or sex offense in 5 yrs	3	Specified drug, violent, semi- violent, or sex offense in 5 yrs			Life
	06/27/78	1978 Acts P.L.202, No.53, §2(a), p. 931	No habitual offender statute					
Puerto Rico	pre-03/01/02		No habitual offender statute					
	03/01/02	1922 Acts P.C. Tit.4, §56-57, 59, p. 480	Petty larceny or attempted prison offense	1	Prison offense, petty larceny, or attempted prison offense			5 years
			Prison offense punishable by term at most 5 years	1	Prison offense			10 years
			Prison offense	1	Petty larceny or attempted prison offense		Maximum	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
R. (cont.)			Prison offense punishable by term greater than 5 years	1	Prison offense		10 years	Life
			Felony	2	Felony	5 years each	15 years	
	07/22/74	1974 Acts No. 115, C.6, Art. 61-62, 74, p. 436, 439-40	Prison offense	1	Felony within 10 years		3 years without parole	One and one-half maximum without parole for 3 years
			Felony	1	Same felony within 15 years		3 years without parole	One and one-half maximum without parole for 3 years
			Prison offense	2	Prison offense within 10 years		3 years without parole	Double maximum without parole for 3 years
			Prison offense	2	Same offense within 15 years		3 years without parole	Double maximum without parole for 3 years
	02/29/76	1975 Acts No.10, §1-2, p. 958 & prior law	Prison offense	1	Felony within 10 years		3 years without parole	Life without parole for 1-1/2 minimum

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
P.R. (cont.)			Felony	1	Same felony within 15 years		3 years without parole	Life without parole for 1-1/2 maximum
			Felony	2	Felony within 10 years		12 years without parole	Life without parole for 12 years
			Felony	2	Same felony within 15 years		12 years without parole	Life without parole for 12 years
Rhode Island	pre-1896		No habitual offender statute					
	1896	1896 Acts C.336, §1, p. 45	Prison offense	2	Prison offense	Prison term	25 years additional	
	04/23/15	1915 Acts C.1261, §71, p. 238	Prison offense	2	Prison offense	Prison term		25 years additional
South Carolina	pre-04/08/55		No habitual offender statute					

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Calif. (cont.)	04/08/55	1955 Acts No. 131, §1, p. 179	Specified violent felony or burglary	2	Specified violent felony or burglary		Maximum	
			Specified violent felony or burglary	3	Specified violent felony or burglary		Life	
South Dakota	pre-1877		No habitual offender statute					
	1877	1877 Acts P.C. C.58, §754, 756, p. 798	Petty larceny or attempted prison offense		Prison offense, 1 petty larceny, or attempted prison offense			5 years
			Prison offense punishable by term at most 5 years	1	Prison offense			10 years
			Any offense	1	Petty larceny or attempted prison offense		Maximum	
			Prison offense punishable by term greater than 5 years	1	Prison offense		10 years	Life

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
W.D. (cont.)	03/08/27	1927 Acts C.119, §1-2, p. 142	Felony	1	Felony or attempted felony		One-half maximum	Double Maximum
			Felony	3	Felony or attempted felony			Life
	03/06/37	1937 Acts C.98, §1, p. 119	Felony	1	Felony or attempted felony			Double Maximum
			Felony	3	Felony or attempted felony			Life
	04/01/77	1976 Acts C.158, §7-9, p. 237	Felony	2	Felony within 20 years			Punishment for next highest felony category
			Felony	3	Felony within 20 years			Punishment for Class 1 felony
	10/01/77	1977 Acts C.189, §16-20, p. 262, §126, p. 282	Felony	1	Felony within 15 years			Punishment for next highest felony category

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
.D. (cont.)			Felony	3	Felony within 15 years		Life	
Tennessee	pre-02/21/39		No habitual offender statute					
	02/21/39	1939 Acts C.22, §1-2, p. 105	Felony except petty larceny	3	2 specified violent felonies and 1 felony		Life without parole	
Texas	pre-1827		No habitual offender statute					
	1827	1827 Acts C.28, §11, p. 86	Felony	1	Felony		Life	
	1836	1836 Acts §41, p. 193	Prison offense	1	Prison offense		Double term of first conviction	Life
	1857	1857 Acts P.C. Tit.22, Art.792, p. 156	Felony	1	Similar felony		Maximum	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Texas (cont.)			Felony	2	Felony		Life	
	01/01/74	1973 Acts C.399, §1, §12.42, p. 908	2d or 3d degree felony	1	Felony		Next highest felony category	
			First degree felony	1	Felony		15 years	Life or 99 years
			Felony	2	Felony		Life	
United States	pre-10/15/70		No habitual offender statute					
	10/15/70	1970 Acts No.91-452, Tit.X, §1001(a), 84 Stat. 948	Felony	2	Prison offense w/in 5 yrs pun- ishable by term exceeding 1 year	Prison term		25 years
Tah	pre-1896		No habitual offender statute					

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Utah (cont.)	1896	1896 Acts C.81, §27, p. 262	Felony	2	Prison offense	3 years each	15 years	Life
	05/08/51	1951 Acts C.77, §1, p. 294	Felony	2	Felony	Prison term	15 years	Life
	07/01/73	1973 Acts C.196, Pt.14, §76-10-1401, p. 684	No habitual offender statute					
	05/13/75	1975 Acts C.46, §1, p. 132	Felony at least 2d degree	2	1 felony & 1 felony at least 2d degree	Prison term	5 years	Life
Vermont	pre-03/16/27		No habitual offender statute					
	03/16/27	1927 Acts No. 128, p. 120	Felony or attempted felony	3	Felony		Life	
	03/03/49	1949 Acts No. 201, p. 186	Felony or attempted felony	3	Felony		Life	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Virgin Islands	pre-08/01/20		No habitual offender statute					
	03/17/21	1921 Acts P.C. Tit. IV, C.11, §3, p. 334	Petty larceny or attempted prison offense	1	Prison offense, petty larceny, or attempted prison offense			5 years
			Prison offense punishable by term at most 5 years	1	Prison offense			10 years
			Prison offense	1	Petty larceny or attempted prison offense		Maximum	
			Prison offense punishable by term greater than 5 years	1	Prison offense		5 years	Life
(St.T, St.J)			Felony	2	Similar felony			10 years
(St.C)			Felony	2	Similar felony			15 years

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
I. (cont.)	09/01/57	1957 Acts Tit. 14, Subch. 4, §61, p. 11	Felony	2	Felony		10 years	Life
	10/25/72	1972 Acts No. 3321, §1, p. 466	Specified violent or semi-violent felony	1	Violent misdemeanor punishable by term at least 6 mos.		One-fifth maximum without parole	Maximum without parole for 1/5 maximum
			Specified violent or semi-violent felony	1	Specified violent or semi-violent felony		One-third maximum without parole	Maximum without parole for 1/3 maximum
			Felony	2	Felony		10 years	Life
			Specified violent or semi-violent felony	2	At least one is specified violent or semi-violent felony		10 years without parole	Life without parole
Virginia	pre-1848		No habitual offender statute					
	1848	1848 Acts §13-14, p. 123	Prison offense with sentence	1	Prison offense	Prison term	5 years additional	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS		PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
					PRIORS				
a. (cont.)			Prison offense with sentence	2		Prison offense	Prison term	Life	
	02/09/16	1916 Acts C.29-30, p. 34-35	Prison offense with sentence	1		Prison offense	Prison term		5 years additional
			Prison offense with sentence	2		Prison offense	Prison term		Life
	04/01/66	1966 Acts C.341, p. 528	Prison offense, not 2d petty larceny, with sentence	1		Prison offense			Life
	03/29/77	1977 Acts C.499, p. 742	Prison offense, not 2d petty larceny, with sentence	1		Felony	Prison term	1 year additional without parole	
			Prison offense, not 3d petty larceny, with sentence	2		Felony	Prison term	3 years additional without parole	
			Prison offense, not 4th petty larceny, with sentence	3		Felony	Prison term	5 years additional without parole	Life

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
a. (cont.)	07/01/79	1979 Acts Ch.411	No habitual offender statute					
Washington	pre-03/14/03		No habitual offender statute					
	03/14/03	1903 Acts C.86, §3, p. 126	Felony	1	Felony		Double first sentence	Life
			Felony	2	Felony		Life	
	03/22/09	1909 Acts C.249, §34, p. 899	Felony, petty larceny, or fraud-type offense	1	Felony		10 years	Life
			Felony, petty larceny, or fraud-type offense	2	Petty larceny or fraudulent misdemeanor		10 years	Life
			Felony or fraudulent misdemeanor	2	Felony		Life	

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Washington (cont.)			Felony, petty larceny, or fraud-type offense	4	Petty larceny or fraudulent misdemeanor		Life	
West Virginia	pre-1870		No habitual offender statute					
	1870	1870 Acts C.152, §23-24, p.701	Prison offense	1	Prison offense	Prison term	5 years additional	
			Prison offense	2	Prison offense		Life	
Wisconsin	pre-1878		No habitual offender statute					
	1878	1878 Acts C.193, §4736, p. 1105	Prison offense	1	Prison offense	Prison term		25 years
	07/01/50	1949 Acts C.631, §171, p. 597	Prison offense	3	Misdemeanor within 5 years			2 years additional

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STATE	EFFECTIVE DATE	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Wis. (cont.)			Prison offense	1	Felony within 5 years			15 years additional
	07/01/55	1955 Acts C.696, §939.62, p. 980	Prison offense	3	Misdemeanor within 5 years			2 years additional
			Prison offense punishable by 1 to 10 year term	1	Felony within 5 years			6 years additional
			Prison offense punishable by term greater than 10 years	1	Felony within 5 years			10 years additional
Wyoming	pre-02/20/37		No habitual offender statute					
	02/20/37	1937 Acts C.68, p. 103	Felony	2	Felony		10 years	50 years
			Felony	3	Felony		Life	

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	NUMBER PRESENT OFFENSE OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Alabama	06/01/79	Code § 15-18-24 (1977); 13-A-5-9, 15-8-9 (Supp. 1978)	Prison offense	1 Same offense		One and one-fourth prior sentence	Maximum
			Class B or C felony	1 Felony		Minimum for next highest felony category	Maximum for next highest felony category
			Specified violent felony	1 Felony resulting in physical injury within 5 years		Minimum without parole	Maximum without parole
			Class A felony	1 Felony	15 years		Life or 99 years
Alaska	01/01/80	S. §§ 12.55.125 to .185, 33.15.180 (Supp. 1978)	Class C felony	1 Felony within 7 years		2 years without parole	5 years without parole for 2 years
			Class B felony	1 Felony within 7 years		4 years without parole	10 years without parole for 4 years
			Class A felony	1 Felony within 7 years		10 years without parole	20 years without parole for 10 years

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Alas. (cont.)			Class C felony	2	Felony within 7 years		3 years without parole	5 years without parole for 3 years
			Class B felony	2	Felony within 7 years		6 years without parole	10 years without parole for 6 years
			Class A felony	2	Felony within 7 years		10 years without parole	20 years without parole for 10 years
Arizona	10/01/78	R.S.A. § 13-604, 13-702 to -703 (1979)	Class 4, 5, or 6 felony	1	Felony within 10 years	Minimum without parole for one-half of sentence	Double maximum without parole for one-half of sentence	
			Class 2 or 3 felony	1	Felony	Minimum without parole for two-thirds of sentence	Treble maximum without parole for two-thirds of sentence	
			Class 4, 5, or 6 armed or violent felony	1	Armed or violent felony	Double minimum without parole for two-thirds of sentence	Treble maximum without parole for two-thirds of sentence	
			Class 2 or 3 armed or violent felony	1	Class 2 or 3 armed or violent felony	Double minimum without parole for two-thirds of sentence	Quadruple maximum w/o parole for two-thirds of sentence	

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Ariz. (cont.)			Class 4, 5, or 6 felony	2	Felony		Double minimum without parole for two-thirds of sentence	Treble maximum without parole of two-thirds of sentence
			Class 2 or 3 felony	2	Felony		Double minimum without parole for two-thirds of sentence	Quadruple maximum w/o parole for two-third of sentence
			Class 4, 5, or 6 armed or violent felony	2	Armed or violent felony		Treble minimum without parole for two-thirds of sentence	Quadruple maximum w/o parole for two-third of sentence
			Class 2 or 3 armed or violent felony	2	Class 2 or 3 armed or violent felony		Treble minimum without parole for two-thirds of sentence	Quintuple maximum w/o parole for two-third of sentence
Arkansas	03/17/77	S.A. §§ 41-1001 to -1005 (1977)	Unclassified felony	2	Felony		Minimum plus 3 years; judge need not apply statute	Maximum plus 5 years
			Class D felony	2	Felony			7 years
			Class C felony	2	Felony		3 years; judge need not apply statute	15 years

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Ark. (cont.)			Class B felony	2	Felony		5 years; judge need not apply statute	30 years
			Felony punishable by life sentence	2	Felony		10 years; judge need not apply statute	Life or 50 years
			Class A felony	2	Felony		10 years; judge need not apply statute	Life or 50 years
			Unclassified Felony	3	Felony		Minimum plus 7 years; judge need not apply statute	Double Maximum
			Class D felony	3	Felony		5 years; judge need not apply statute	, 10 years
			Class C felony	3	Felony		10 years; judge need not apply statute	20 years
			Class B felony	3	Felony		20 years; judge need not apply statute	40 years

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Ark. (cont.)			Felony punishable by life sentence	3	Felony		25 years; judge need not apply statute	Life or 50 years
			Class A felony	3	Felony		50 years; judge need not apply statute	Life
California	07/01/77	P.C. § 667.5 (West Supp. 1978)	Prison felony	1	Prison offense within 5 years	1 year	1 year additional for each prior	
			Specified violent felony	1	Specified violent or armed felony within 10 years	1 year	3 years additional for each prior	
Canal Zone	09/10/04	C. Tit. 6, § 111 (1963)	Prison offense punishable by term at most 5 years	1	Prison offense			10 years
			Prison offense	1	Petty larceny or attempted prison offense		Maximum	
			Prison offense punishable by term greater than 5 years	1	Prison offense		10 years	Life

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
C.Z. (cont.)			Felony	2	Felony	5 years each	15 years	
Colorado	07/01/76	R.S. § 16-13-101 (1978)	Felony punishable by term greater than 5 years	2	Felony within 10 years		25 years	50 years
			Felony	3	Felony		Life	
Connecticut	10/01/71	G.S.A. § 53a-35, 53a-40 (1972 & Supp. 1978)	Class D felony	2	Prison offense	1 year		10 years without parole for 5 years
			Class C felony	2	Prison offense	1 year		20 years without parole for 10 years
			Class B felony	2	Prison offense	1 year		Life without parole for 25 years
			Specified violent offense	2	Specified violent prison offense	1 year		Life without parole for 25 years

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Delaware	06/22/70	C.A. Tit. II, § 4214-15 (Supp. 1978)	Specified violent or semi-violent felony	2	Specified violent or semi-violent felony		Life without parole	
			Felony	3	Felony other than specified violent or semi-violent felony			Life
District of Columbia	02/01/71	C.A. § 22-104 to -104a (1973)	Any offense	1	Any offense			One and one-half maximum
			Any offense	2	Any offense			Treble Maximum
			Felony	2	Felony			Life
Florida	07/01/75	S.A. § 775.084 (West 1976 & Supp. 1978)	Third degree felony	1	Felony within 5 years			10 years
			Second degree felony	1	Felony within 5 years			30 years

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Fla. (cont.)			First degree felony	1	Felony within 5 years			Life
			Third degree felony	2	Prison offense punishable by term exceeding 1 yr w/in 5 yrs			10 years
			Second degree felony	2	Prison offense punishable by term exceeding 1 yr w/in 5 yrs			30 years
			First degree felony	2	Prison offense punishable by term exceeding 1 yr w/in 5 yrs			Life
Georgia	12/21/53	C.A. § 27-2511 (1975)	Prison offense	1	Prison offense	Prison term	Maximum	
			Felony	3	Felony		Maximum without parole	
Hawaii	06/01/76	R.S. § 706-662 (1976 & Supp. 1978)	Specified violent or dangerous drug offense	1	Same offense		5 years without parole	

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Hawaii (cont.)			Class A or B armed felony	1	Armed felony		10 years without parole	Life
			Class C felony	2	Felony			10 years
			Class B felony	2	Felony			20 years
			Specified violent or dangerous drug offense	2	Same offense		10 years without parole	
			Class A felony	2	Felony			Life
Idaho	03/09/23	Code § 19-2514 (Supp. 1978)	Felony	2	Felony		5 years	Life
Illinois	02/01/78	A.S. C.38, §§ 33A to B, 1005-5-3.2, 1005-8-1 to -3 (1978)	Specified armed offense	1	Specified armed offense within 5 years		1 year	6 years

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Ill. (cont.)			Specified armed felony	1	Felony within 5 years		2 years	10 years
			Class 1 or 2 felony	2	Class 1 or 2 felony		6 years	30 years
			Specified violent felony	2	Specified violent felony		Life without parole	
Indiana	10/01/77	C.A. § 35-50-2-8 (1979)	Felony or prison offense punishable by term greater than 1yr	2	Felony or prison offense punishable by term greater than 1yr		30 years additional	
Iowa	01/01/78	C.A. § 747.1 (West 1956); §§ 902.8-.9 (West Supp. 1979)	Class C or D felony	2	Felony		Greater of 3 yrs or minimum, without parole for 3 years	15 years without parole for 3 years
			Specified felony	2	Specified felony	3 years each		40 years
Kansas	01/01/79	C.C. & C.C.P. § 21-4504 (Vernon Supp. 1978)	Prison felony	1	Prison felony			Double Maximum

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Kan. (cont.)			Felony	2	Felony			Treble Maximum
Kentucky	03/29/76	R.S.A. § 532.080 (Supp. 1978)	Felony	1	Felony within 5 years	1 year	Next highest felony category without parole	
			Class C or D felony	2	Felony within 5 years	1 year	10 years without parole	20 years without parole for 10 years
			Class A or B felony	2	Felony within 5 years	1 year	20 years without parole for 10 years	Life without parole for 10 years
Louisiana	09/08/78	C.C.P.A. Art. 15:529.1 (1956 & Supp. 1978)	Felony	1	Felony within 5 years		One-third maximum	Double Maximum
			Felony	2	Felony within 5 years		One-half maximum	Double Maximum
			Felony	2	Violent felony or felony punishable by term exceeding 12 yrs		Life without parole	

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
La. (cont.)			Felony	3	Felony within 5 years		Greater of 20 years or maximum	Life
			Felony	3	1 felony & 2 felonies violent or carrying more than 12 yr term		Life without parole	
Maine	03/01/76		No habitual offender statute					
Maryland	07/01/77	A.C. Art. 27, § 643B (Supp. 1978)	Specified violent offense or attempted offense	2	Specified violent offense or attempted offense	1 prison term	25 years	
			Specified violent offense or attempted offense	3	Specified violent offense or attempted offense	Prison term each	Life without parole	
Massachusetts	05/06/04	G.L.A. Ch. 279, § 25 (West 1972)	Felony	2	Prison offense	3 years each	Maximum	
Michigan	04/01/72	C.L.A. §§ 28.1082 to .1084 (Supp. 1979)	Felony	1	Felony or attempted felony			One and one-half maximum

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Michigan. (cont.)			Felony	2	Felony or attempted felony			Double Maximum
			Specified drug offense	1	Specified drug offense			Double Maximum
			Felony punishable by term less than 5 years	3	Felony or attempted felony			15 years
			Felony punishable by term at least 5 years	3	Felony or attempted felony			Life
Minnesota	05/01/80	S.A. § 609.346 (Supp. 1978)	Specified violent offense	1	Specified violent offense		3 years	
Mississippi	01/01/77	C.A. §§99-19-81 to -83 (Supp. 1978)	Felony	2	Felony	1 year each	Maximum without parole	
			Felony	2	Felony; if #1 is nonviolent, then at least 1 violent felony	1 year each	Life without parole	

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Missouri	01/01/79	A.S. §§ 558.016, 571.015 (Supp. 1979)	Class D felony	1	Class A or B or dangerous felony			10 years
			Class C felony	1	Class A or B or dangerous felony			15 years
			Class B felony	1	Class A or B or dangerous felony			30 years
			Armed felony	1	Armed felony	5 years additional without parole for 5 years	Life without parole for 5 years	
			Class D felony	2	Felony			10 years
			Class C felony	2	Felony			15 years
			Class B felony	2	Felony			30 years

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
o. (cont.)			Armed felony	2	Armed felony		10 years additional without parole for 10 years	Life without parole for 10 years
Montana	01/01/74	R.C.A. §§ 46-18-501 to -502 (1978)	Felony	1	Prison felony w/in 5 yrs punishable by term exceeding 1 year	1 year	5 years	100 years
Nebraska	10/22/67	R.S. § 29-2221 (1975)	Felony	2	Prison offense	1 year each	10 years	Greater of 60 years or maximum
Nevada	04/18/77	R.S. § 207.010 (1977)	Felony, petty larceny, or fraud-type offense	2	Felony		10 years	20 years
			Felony, petty larceny, or fraud-type offense	3	Petty larceny or fraudulent misdemeanor		10 years	20 years
			Felony, petty larceny, or fraud-type offense	3	Felony		Life w/o parole 10 years; judge can dismiss habitual count	Life without parole; judge can dismiss habitual count
			Felony, petty larceny, or fraud-type offense	5	Petty larceny or fraudulent misdemeanor		Life w/o parole 10 years; judge can dismiss habitual count	Life without parole; judge can dismiss habitual count

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
New Hampshire	11/01/73	R.S.A. § 651:6 (1974)	Felony	2	Prison offense	1 year each	10 years	30 years
New Jersey	09/01/79	S.A. § 2C:44-1 to -4 (West Supp. 1980)	No habitual offender statute					
New Mexico	07/01/79	S.A. §§ 40A-29-30 (Supp. 1979)	Felony	1	Prison felony punishable by term at least 1 year		1 year additional	
			Felony	2	Prison felony punishable by term at least 1 year		2 years additional	
			Felony	3	Prison felony punishable by term at least 1 year		4 years additional	
New York	09/01/78	P.L. §§ 70.04, 70.06-.10 (McKinney 1975 & Supp. 1978)	Specified nonviolent felony Class E	1	Nonviolent felony w/in 10 yrs punishable by term exceeding 1 yr		3 years without parole for 1-1/2 years	4 years without parole for 2 years
			Specified nonviolent felony Class D	1	Nonviolent felony w/in 10 yrs punishable by term exceeding 1 yr		4 years without parole for 2 years	7 years without parole for 3-1/2 years

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
.Y. (cont.)			Specified nonviolent felony Class C	1	Nonviolent felony w/in 10 yrs punishable by term exceeding 1 yr	6 years without parole for 3 years	15 years without parole for 7-1/2 years	
			Specified nonviolent felony Class B	1	Nonviolent felony w/in 10 yrs punishable by term exceeding 1 yr	9 years without parole for 4-1/2 years	25 years without parole for 12-1/2 years	
			Specified violent felony Class D	1	Violent felony w/in 10 yrs punishable by term exceeding 1 yr	5 years without parole for 2-1/2 years	7 years without parole for 3-1/2 years	
			Specified violent felony Class C	1	Violent felony w/in 10 yrs punishable by term exceeding 1 yr	8 years without parole for 4 years	15 years without parole for 7-1/2 years	
			Specified violent felony Class B	1	Violent felony w/in 10 yrs punishable by term exceeding 1 yr	12 years without parole for 6 years	25 years without parole for 12-1/2 years	
			Specified nonviolent felony	2	Nonviolent felony w/in 10 yrs punishable by term exceeding 1 yr		Life without parole for 25 years	
			Specified violent felony Class D	2	Violent felony w/in 10 yrs punishable by term exceeding 1 yr	Life without parole for 6 years	Life without parole for 25 years	

TABLE 4 (cont.)

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
N.Y. (cont.)			Specified violent felony Class C	2	Violent felony w/in 10 yrs punishable by term exceeding 1 yr		Life without parole for 8 years	Life without parole for 25 years
			Specified violent felony Class B	2	Violent felony w/in 10 yrs punishable by term exceeding 1 yr		Life without parole for 10 years	Life without parole for 25 years
North Carolina	07/06/67	G.S. §§ 14-7.1 to -7.6 (1969); § 14-7.1 (Supp. 1977)	Felony	3	Felony		20 years without parole for 15 years	Life without parole for 30 years
North Dakota	07/01/75	C.C. § 12.1-33-02.9 (1976 & Supp. 1977)	Violent felony	1	Violent felony			Life
			Class C felony	2	Class A or B felony			10 years
			Class B felony	2	Class A or B felony			20 years
			Class A felony	2	Class A or B felony			Life

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
D. (cont.)			Class C felony	3	1 Class B felony & 2 prison offenses below Class B felony			10 years
			Class B felony	3	1 Class B felony & 2 prison offenses below Class B felony			20 years
			Class A felony	3	1 Class B felony & 2 prison offenses below Class B felony			Life
Ohio	01/01/74	R.C.A. §§ 2929.01, 2929.11- .12 (Page 1975 & Supp. 1978)	No habitual offender statute					
Oklahoma	10/01/78	S.A. Tit. 21, §§ 51-52 West Supp. 1978)	Petty larceny or attempted prison offense	1	Prison offense within 10 years			5 years
			Prison offense punishable by term at most 5 years	1	Prison offense within 10 years			10 years
			Prison offense punishable by term greater than 5 years	1	Prison offense within 10 years		10 years	Life

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Oklahoma (cont.)			Felony	2	Felony within 10 years		20 years	Life
Oregon	01/01/72	R.S. §§ 161.725, 166.230 (1977)	Armed felony or attempted felony	1	Armed felony or attempted felony			15 years additional
			Violent felony	1	Felony within 7 years			30 years
			Armed felony or attempted felony	2	Armed felony or attempted felony			25 years additional
			Armed felony or attempted felony	3	Armed felony or attempted felony			Life
Pennsylvania	06/27/78		No habitual offender statute					
Puerto Rico	02/29/76	L.A. Tit. 33, §§ 3301-02, 3375 (Supp. 1977)	Prison offense	1	Felony within 10 years		3 years without parole	Life without parole for 1-1/2 minimum

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
P.R. (cont.)			Felony	1	Same felony within 15 years		3 years without parole	Life without parole for 1-1/2 maximum
			Felony	2	Felony within 10 years		12 years without parole	Life without parole for 12 years
			Felony	2	Same felony within 15 years		12 years without parole	Life without parole for 12 years
Rhode Island	04/23/15	G.L. § 12-19-21 (1969)	Prison offense	2	Prison offense	Prison term		25 years additional
South Carolina	04/08/55	Code § 17-25-40 (1976)	Specified violent felony or burglary	2	Specified violent felony or burglary		Maximum	
			Specified violent felony or burglary	3	Specified violent felony or burglary		Life	
South Dakota	10/01/77	C.L.A. §§ 22-6-1, 22-7-7 to -9 (Supp. 1978)	Felony	1	Felony within 15 years		Punishment for next highest felony category	

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
S.D. (cont.)			Felony	3	Felony within 15 years		Life	
Tennessee	02/21/39	C.A. § 40-2801, 40-2806 (1975)	Felony except petty larceny	3	2 specified violent felonies and 1 felony		Life without parole	
Texas	01/01/74	P.C.A. § 12.42 (Vernon 1974)	2d or 3d degree felony	1	Felony		Next highest felony category	
			First degree felony	1	Felony	15 years	Life or 99 years	
			Felony	2	Felony		Life	
United States	10/15/70	18 U.S.C. 3575 (1976)	Felony	2	Prison offense w/in 5 yrs punishable by term exceeding 1 year	Prison term		25 years
Utah	05/13/75	C.A. § 76-8-1001 (1977)	Felony at least 2d degree	2	1 felony & 1 felony at least 2d degree	Prison term	5 years	Life

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Vermont	03/03/49	S.A. Tit. 13, § 11 (1974)	Felony or attempted felony	3	Felony			Life
Virgin Islands	10/25/72	C.A. Tit. 14, § 61 (Supp. 1978)	Specified violent or semi-violent felony	1	Violent misdemeanor punishable by term at least 6 mos.	One-fifth maximum without parole	Maximum without parole for 1/5 maximum	
			Specified violent or semi-violent felony	1	Specified violent or semi-violent felony	One-third maximum without parole	Maximum without parole for 1/3 maximum	
			Felony	2	Felony	10 years	Life	
Virginia	07/01/79		Specified violent or semi-violent felony	2	At least one is specified violent or semi-violent felony	10 years without parole	Life without parole	
			No habitual offender statute					
Washington	03/22/09	R.C.A. § 9.92.090 (1975)	Felony, petty larceny, or fraud-type offense	1	Felony	10 years	Life	

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Wash. (cont.)			Felony, petty larceny, or fraud-type offense	2	Petty larceny or fraudulent misdemeanor		10 years	Life
			Felony or fraudulent misdemeanor	2	Felony		Life	
			Felony, petty larceny, or fraud-type offense	4	Petty larceny or fraudulent misdemeanor		Life	
West Virginia	1870	Code § 61-11-18 (1977)	Prison offense	1	Prison offense	Prison term	5 years additional	
			Prison offense	2	Prison offense			
Wisconsin	07/01/55	S.A. § 939.62 (West 1975 & Supp. 1978)	Prison offense	3	Misdemeanor within 5 years		2 years additional	
			Prison offense punishable by 1 to 10 year term	1	Felony within 5 years			

CURRENT HABITUAL OFFENDER STATUTES

STATE	EFFECTIVE DATE	CURRENT CODE CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM	DISCRETIONARY MAXIMUM
Wis. (cont.)			Prison offense punishable by term greater than 10 years	1	Felony within 5 years			10 years additional
Wyoming	02/20/37	S. §§ 6-1-109 to -110 (1977)	Felony	2	Felony		10 years	50 years
			Felony	3	Felony		Life	

TABLE 4 (cont.)

8/04/79

STATES PREVIOUSLY MANDATING LIFE SENTENCE FOR ANY OR NONVIOLENT FELONIES

STATE	EFFECTIVE & END DATES	# OF YEARS	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM
Alaska	39 03 09 63 01 01	24	1939 Acts C.53, §1-2, p. 138	Felony	3	Felony		Life
California	27 07 29 31 08 14	4	1927 Acts C.634, §1, p. 1066	Felony	2	Specified offense		Life without parole for 12 years
California	27 07 29 31 08 14		1927 Acts C.634, §1, p. 1066	Felony	3	Felony		Life without parole
Florida	27 06 03 72 01 01	45	1927 Acts C.12022, No. 217, §1-2, p. 621	Felony	3	Felony or attempted felony		Life
Indiana	07 04 10 77 10 01	70	1907 Acts C. 82, §1, p. 109	Felony	2	Felony	Prison term	Life
Kansas	27 06 01 37 06 30	12	1927 Acts C.191, §1, p. 247	Felony	2	Felony		Life
Kansas	37 06 30 39 06 30		1937 Acts Prior law	Felony	2	Felony		Life

8/04/79

STATES PREVIOUSLY MANDATING LIFE SENTENCE FOR ANY OR NONVIOLENT FELONIES

STATE	EFFECTIVE & END DATES	# OF YEARS	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM
Kentucky	1881 75 01 01	94	1881 Acts C.29, Art.1, §12, p. 318	Felony	2	Felony		Life
Louisiana	28 07 07 42 07 07	14	1928 Acts No. 15, §1-2, p. 17	Felony	3	Felony or attempted felony		Life
Massachusetts	1818 1833	15	1817 Acts C.176, §5, 6, p. 447	Prison offense	2	Prison offense	Prison term	Life plus 30 days solitary confinement
Michigan	27 09 05 29 04 02	22	1927 Acts No. 175, C.9, §10-12, p. 324	Felony	3	Felony or attempted felony		Life
Michigan	29 04 02 49 09 23		1929 Acts No. 24, C.9, §10-12, p. 52-53	Felony punishable by term at least 5 years	3	Felony		Life
Nevada	12 01 01 67 07 01	55	1911 Acts C.7, §6292, p. 1811	Felony, petty larceny, or fraud-type offense	3	Felony		Life
Nevada	12 01 01 67 07 01		1911 Acts C.7, §6292, p. 1811	Felony, petty larceny, or fraud-type offense	5	Petty larceny or fraudulent misdemeanor		Life

STATES PREVIOUSLY MANDATING LIFE SENTENCE FOR ANY OR NONVIOLENT FELONIES

STATE	EFFECTIVE & END DATES	# OF YEARS	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM
New Jersey	40 11 19 50 07 06	13	1940 Acts C.219, §1-3, p. 889	Any offense	3	High misdemeanor		Life
New Jersey	50 07 06 53 05 22		1950 Acts Prior law	Any offense	3	High misdemeanor		Life
New Mexico	29 03 11 79 07 01	50	1929 Acts C.58, p. 83	Felony	3	Felony		Life
New York	1796 1881	110	1796 Acts C.30, p. 669	Felony above petty larceny unless punishable by death	1	Felony above petty larceny unless punishable by death		Life
New York	07 09 01 20 09 01		1907 Acts C.645, p. 1494	Felony	3	Felony or attempted felony		Life
New York	20 09 01 32 04 04		1920 Acts Prior law	Felony	3	Felony		Life
Pi	1885 29 04 02	44	1885 Acts H.B.No. 751, §2, p. 236	Prison felony	2	Prison felony	Prison term each	Life

8/04/79

STATES PREVIOUSLY MANDATING LIFE SENTENCE FOR ANY OR NONVIOLENT FELONIES

STATE	EFFECTIVE & END DATES	# OF YEARS	CITE	PRESENT OFFENSE	NUMBER OF PRIORS	PREVIOUS OFFENSES	PREVIOUS SENTENCES	MANDATORY MINIMUM
Oregon	21 02 14 27 03 03	26	1921 Acts C.70, §1, p. 97	Prison felony	2	Prison felony		Life
Oregon	27 03 03 47 07 05		1927 Acts C.334, §1-3, p.432	Felony	3	Felony or attempted felony		Life
Vermont	27 03 16 49 03 03	22	1927 Acts No. 128, p. 120	Felony or attempted felony	3	Felony		Life
Virginia	1848 16 02 09	68	1848 Acts §13-14, p. 123	Prison offense with sentence	2	Prison offense	Prison term	Life

**HABITUAL OFFENDER STATUTES,
CATEGORIZED BY LENGTH OF PUNISHMENT AND TYPE OF OFFENSES: 1900-1980**

MANDATORY LIFE SENTENCE

PRESENT OFFENSE

PAST OFFENSE

COMBINED PRESENT AND PAST OFFENSES

1900

Any: Texas, West Virginia, Kentucky, Ohio,
Virginia (s)

Any 2: Kentucky, Texas, West Virginia, Ohio (j)
Virginia (j)

Any 3: Texas, West Virginia, Kentucky, Ohio (j),
Virginia (j)

1905

Any: Texas, West Virginia, Washington,
Kentucky, Ohio, Virginia (s)

Any 2: Kentucky, Texas, Washington, Ohio, (j),
Virginia (j), West Virginia

Any 3: Texas, West Virginia, Washington,
Kentucky, Ohio (j), Virginia (j)

1910

Any: Texas, West Virginia, Kentucky,
New York, Indiana, Ohio,
Washington, Virginia (s)

Any 2: Kentucky, Texas, Washington, West
Virginia, Indiana (j), Ohio (j),
Virginia (j)

Any 3: Texas, West Virginia, Kentucky,
Washington, Indiana (j), Ohio (j),
Virginia (j)

Any 3: New York

Any 4: New York

NV 4: Washington

NV 5: Washington

1915

Any: Kentucky, Nevada, New York, Texas,
Washington, West Virginia, Indiana,
Ohio, Virginia (s)

Any 2: Kentucky, Texas, Washington, West
Virginia, Indiana (j), Ohio (j),
Virginia (j)

Any 3: Kentucky, Texas, Washington, West
Virginia, Indiana (j), Ohio (j),
Virginia (j,s)

MANDATORY LIFE SENTENCE (cont.)

PRESENT OFFENSE

PAST OFFENSE

COMBINED PRESENT AND PAST OFFENSES

1915 (cont.)

Any 3: New York

NV 4: Washington

NV 5: Nevada

Any 4: Nevada, New York

NV 5: Washington

NV 6: Nevada

1920

Any: Kentucky, Nevada, New York, Texas, Washington, West Virginia, Indiana, Ohio

Any 2: Kentucky, Texas, Washington, West Virginia, Indiana (j), Ohio (j)

Any 3: Nevada, New York

NV 4: Washington

NV 5: Nevada

Any 3: Kentucky, Texas, Washington, West Virginia, Indiana (j), Ohio (j)

NV 5: Washington

NV 6: Nevada

1925

Any: Kentucky, Nevada, New York, Oregon, Texas, Washington, West Virginia, Indiana, Ohio, California

Any 2: Kentucky, Oregon, Texas, Washington, West Virginia, Indiana (j), Ohio (j)

Any 3: Nevada, New York

NV 4: Washington

NV 5: Nevada

SV 3: California

Any 3: Kentucky, Oregon, Texas, Washington, West Virginia, Indiana (j), Ohio (j)

Any 4: Nevada, New York

NV 5: Washington

NV 6: Nevada

SV 4: California

MANDATORY LIFE SENTENCE (cont.)

PRESENT OFFENSE

PAST OFFENSE

COMBINED PRESENT AND PAST OFFENSES

Any: California, Florida, Kansas,
Kentucky, Louisiana, Nevada, New
Mexico, New York, Oregon, Texas,
Vermont, Washington, West Virginia,
Indiana, Michigan (m)

V : Missouri

O : Colorado, Ohio

Any 2: Kansas, Kentucky, Texas, Washington,
West Virginia, Indiana (j)

Any 3: California, Florida, Louisiana, Michigan,
Nevada, New Mexico, New York, Oregon,
Vermont

NV 2: California

NV 4: Washington,

NV 5: Nevada

V 3: Missouri

O 3: Colorado, Ohio

1930

Any 3: Kansas, Kentucky, Texas, Washington,
West Virginia, Indiana (j)

Any 4: California, Florida, Louisiana,
Nevada, New Mexico, New York,
Oregon, Vermont, Michigan (m)

NV 3: California

NV 5: Washington

NV 6: Nevada

V 4: Missouri

O 4: Colorado, Ohio

1935

Any : Florida, Kansas, Kentucky, Louisiana,
Nevada, New Mexico, Oregon, Texas,
Vermont, Washington, West Virginia,
Indiana, California, Michigan (m)

V : Missouri

O : Colorado, Ohio

Any 2: Kansas, Kentucky, Texas, Washington,
West Virginia, Indiana (j)

Any 3: Florida, Louisiana, Michigan,
Nevada, New Mexico, Oregon,
Vermont

NV 4: Washington

NV 5: Nevada

Any 3: Kansas, Kentucky, Texas, Washington
West Virginia, Indiana (j)

Any 4: Florida, Louisiana, Michigan
Nevada, New Mexico, Oregon,
Vermont

NV 5: Washington

NV 6: Nevada

V 4: Missouri

MANDATORY LIFE SENTENCE (cont.)

PRESENT OFFENSE

PAST OFFENSE

COMBINED PRESENT AND PAST OFFENSES

1935 (cont.)

V 3: Missouri	O 2: California (j)	O 3: Colorado, Ohio, California (j)
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O 3: California (j)	O 4: California (j), Colorado, Ohio
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1940

Any: Alaska, Florida, Kentucky, Louisiana, Nevada, New Mexico, Oregon, Texas, Vermont, Washington, West Virginia, Wyoming, Indiana, Nevada, California, Michigan (m)

NV : Tennessee

V : Missouri

O : Colorado, Ohio

Any 2: Kentucky, Texas, Washington, West Virginia, Indiana (j)	Any 3: Alaska, Florida, Louisiana, Michigan, Nevada, New Mexico, Oregon, Vermont, Wyoming
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Any 3: Kentucky, Texas, Washington, West Virginia, Indiana (j)	Any 4: Alaska, Florida, Louisiana, Nevada, New Mexico, Oregon, Vermont, Wyoming, Michigan (m)
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NV 4: Washington

NV 5: Nevada

V 3: Missouri, Tennessee

O 2: California (j)

O 3: Colorado, Ohio, California (j)

NV 5: Washington

NV 6: Nevada

V 4: Missouri

O 3: California

O 4: California (j)

Any: Alaska, California, Florida, Kentucky, Nevada, New Jersey, New Mexico, Oregon, Texas, Vermont, Washington, West Virginia, Wyoming, Indiana, Michigan (m)

Any 2: Kentucky, Texas, Washington, West Virginia, Indiana (j)	Any 3: Alaska, Florida, Michigan, Nevada, New Jersey, New Mexico, Oregon, Vermont, Wyoming
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Any 3: Kentucky, Texas, Washington, West Virginia, Indiana (j)	Any 4: Alaska, Florida, Nevada, New Jersey, New Mexico, Oregon, Vermont, Wyoming Michigan (m)
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1945

Any 2: Kentucky, Texas, Washington, West Virginia, Indiana (j)	Any 3: Alaska, Florida, Michigan, Nevada, New Jersey, New Mexico, Oregon, Vermont, Wyoming
--	--

Any 3: Kentucky, Texas, Washington, West Virginia, Indiana (j)	Any 4: Alaska, Florida, Nevada, New Jersey, New Mexico, Oregon, Vermont, Wyoming Michigan (m)
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MANDATORY LIFE SENTENCE (cont.)

PRESENT OFFENSE

PAST OFFENSE

COMBINED PRESENT AND PAST OFFENSES

1945 (cont.)

NV: Tennessee

NV 4: Washington

NV 5: Washington

V: Missouri

NV 5: Nevada

NV 6: Nevada

O: Colorado, Ohio

V 3: Missouri, Tennessee

V 4: Missouri, Tennessee

O 2: California (j)

O 3: California (j)

O 3: Colorado, Ohio, California (j)

O 4: California (j), Colorado, Ohio

1950

Any: Alaska, Colorado, Florida, Kentucky, Nevada, New Jersey, New Mexico, Texas, Washington, West Virginia, Wyoming, Indiana

Any 2: Kentucky, Texas, Washington, West Virginia, Indiana (j)

Any 3: Kentucky, Texas, Washington, West Virginia, Indiana (j)

Any 3: Alaska, Colorado, Florida, Nevada, New Jersey, New Mexico, Wyoming

Any 4: Alaska, Colorado, Florida, Nevada, New Jersey, New Mexico, Wyoming

NV: Tennessee

NV 2: California (j)

NV 3: California (j)

SV: California

NV 3: California (j)

NV 4: California (j)

V: Missouri

NV 4: Washington

NV 5: Washington

O: Ohio

NV 5: Nevada

NV 6: Nevada

V 3: Missouri, Tennessee

V 4: Missouri

O 3: Ohio

O 4: Ohio

MANDATORY LIFE SENTENCE (cont.)

<u>PRESENT OFFENSE</u>	<u>PAST OFFENSE</u>	<u>COMBINED PRESENT AND PAST OFFENSES</u>
<u>1955</u>		
Any: Alaska, Colorado, Florida, Kentucky, Nevada, New Mexico, Texas, Washington, West Virginia, Wyoming, Indiana	Any 2: Kentucky, Texas, Washington, West Virginia, Indiana (j)	Any 3: Kentucky, Texas, Washington, West Virginia, Indiana (j)
NV: Tennessee	Any 3: Alaska, Colorado, Florida, Nevada, New Mexico, Wyoming	Any 4: Alaska, Colorado, Florida, Nevada, New Mexico, Wyoming
SV: California	NV 2: California (j)	NV 4: California (j)
V: Missouri	NV 3: California (j)	NV 5: Washington
O: Ohio	NV 4: Washington	NV 6: Nevada
	NV 5: Nevada	SV 3: California (j)
	V 3: Missouri, Tennessee	V 4: Missouri, Tennessee
	O 3: Ohio	O 4: Ohio
<u>1960</u>		
Any: Alaska, Colorado, Florida, Kentucky, Nevada, New Mexico, Texas, Washington, West Virginia, Wyoming, Indiana	Any 2: Kentucky, Texas, Washington, West Virginia, Indiana (j)	Any 3: Kentucky, Texas, Washington, West Virginia, Indiana (j)
NV: Tennessee	Any 3: Alaska, Colorado, Florida, Nevada, New Mexico, Wyoming	Any 4: Alaska, Colorado, Florida, Nevada, New Mexico, Wyoming
SV: California, South Carolina	NV 2: California (j)	NV 3: California (j)
V: Missouri	NV 3: California (j)	NV 4: California (j)

MANDATORY LIFE SENTENCE (cont.)

<u>PRESENT OFFENSE</u>	<u>PAST OFFENSE</u>	<u>COMBINED PRESENT AND PAST OFFENSES</u>
<u>1960 (cont.)</u>		
O: Ohio	NV 4: Washington	NV 5: Washington
	NV 5: Nevada	NV 6: Nevada
	SV 3: South Carolina	SV 4: South Carolina
	V 3: Missouri, Tennessee	V 4: Missouri, Tennessee
	O 3: Ohio	O 4: Ohio
<u>1965</u>		
Any: Colorado, Florida, Kentucky, Nevada, New Mexico, Texas, Washington, West Virginia, Wyoming, Indiana	Any 2: Kentucky, Texas, Washington, West Virginia, Indiana (j)	Any 3: Kentucky, Texas, Washington, West Virginia, Indiana (j)
NV: Tennessee	Any 3: Colorado, Florida, Nevada, New Mexico, Wyoming	Any 4: Colorado, Florida, Nevada, New Mexico, Washington, Wyoming
SV: California, South Carolina	NV 2: California (j)	NV 3: California (j)
V: Missouri	NV 3: California (j)	NV 4: California (j)
O: Ohio	NV 4: Washington	NV 5: Washington
	NV 5: Nevada	NV 6: Nevada
	SV 3: South Carolina	SV 4: South Carolina
	V 3: Missouri, Tennessee	V 4: Missouri, Tennessee
	O 3: Ohio	O 4: Ohio

MANDATORY LIFE SENTENCE (cont.)

PRESENT OFFENSE

PAST OFFENSE

COMBINED PRESENT AND PAST OFFENSES

1970

Any: Colorado, Florida, Kentucky, Nevada
New Mexico, Texas, Washington, West
Virginia, Wyoming, Indiana

Any 2: Kentucky, Texas, Washington, West
Virginia, Indiana (j)

Any 3: Kentucky, Texas, Washington, West
Virginia, Indiana (j)

NV: Tennessee

Any 3: Colorado, Florida, Nevada, New Mexico,
Wyoming

Any 4: Colorado, Florida, Nevada, New Mexico,
Wyoming

SV: California, South Carolina

NV 2: California (j)

NV 3: California (j)

V: Missouri

NV 3: California (j), Missouri, Tennessee

NV 4: California (j)

O: Ohio

NV 4: Washington

NV 5: Washington

NV 5: Nevada

NV 6: Nevada

SV 3: South Carolina

SV 4: South-Carolina

V 3: Missouri, Tennessee

V 4: Missouri, Tennessee

O 3: Ohio

O 4: Ohio

1975

Any: Colorado, Nevada, New Mexico, Texas,
Washington, West Virginia, Wyoming,
Indiana

Any 2: Texas, Washington, West Virginia,
Indiana (j), Kentucky (j)

Any 3: Texas, Washington, West Virginia,
Indiana (j)

NV: Tennessee

Any 3: Colorado, Nevada, New Mexico, Wyoming

Any 4: Colorado, Nevada, New Mexico, Wyoming

SV: California, Delaware, South Carolina

NV 2: California (j)

NV 3: California (j)

V: Kentucky, Missouri

NV 3: California (j)

NV 4: California (j)

MANDATORY LIFE SENTENCE (cont.)

PRESENT OFFENSE

PAST OFFENSE

COMBINED PRESENT AND PAST OFFENSES

1975 (cont.)

NV 4: Washington

NV 5: Washington

NV 5: Nevada

NV 6: Nevada

SV 2: Delaware

SV 3: Delaware

V 3: Missouri, Tennessee

SV 4: South Carolina

V 3: Kentucky (j)

V 4: Missouri, Tennessee

1980

Any: Colorado, Mississippi, South Dakota, Nevada, Texas, Washington, West Virginia, Wyoming, Louisiana

Any 2: Texas, Washington, West Virginia

Any 3: Texas, Washington, West Virginia

NV: Tennessee

Any 3: Colorado, Nevada, Wyoming, South Dakota (t)

Any 4: Colorado, Nevada, Wyoming, South Dakota (t)

SV: Delaware, South Carolina

NV 4: Washington

NV 5: Washington

V: Illinois, Maryland, New York

NV 5: Nevada

NV 6: Nevada

SV 2: Delaware

SV 3: Delaware

SV 3: South Carolina

SV 4: South Carolina

V 2: Illinois, Louisiana, Mississippi (j), New York (m,t)

V 3: Louisiana, Illinois, Mississippi (j),

V 3: Louisiana, Maryland, Tennessee New York (m,t)

V 4: Louisiana, Maryland, Tennessee

**HABITUAL OFFENDER STATUTES,
CATEGORIZED BY LENGTH OF PUNISHMENT AND TYPE OF OFFENSES: 1900-1980**

DISCRETIONARY LIFE SENTENCE

PRESENT

PAST

PRESENT AND PAST

1900

Any: Louisiana, Maine, Utah, Michigan, South Dakota (m), North Dakota (m), Oklahoma (m), California (m), Montana (m)

Any 1: California, Montana, North Dakota, Oklahoma, South Dakota, Maine (j)

Any 2: California (m), Montana (m), North Dakota (m), Maine (j), South Dakota (m), Oklahoma (m)

NV: Illinois

Any 2: Michigan (j), Utah (j)

Any 3: Michigan (j), Utah (j)

O: Iowa

Any 3: Louisiana

Any 4: Louisiana

NV 2: Illinois

NV 3: Illinois

O 2: Iowa

O 3: Iowa

1905

Any: Washington, Louisiana, Maine, Utah, Michigan, Arizona (m), Canal Zone (m), South Dakota (m), Puerto Rico (m), North Dakota (m), Oklahoma (m), California (m), Montana (m)

Any 1: Arizona, California, Canal Zone, Montana, North Dakota, Oklahoma, Puerto Rico, South Dakota, Washington, Maine (j)

Any 2: Arizona (m), California (m), Canal Zone(m), Montana (m), North Dakota (m), Oklahoma (m), Puerto Rico (m), South Dakota (m), Washington, Maine (j)

NV: Illinois

Any 2: Michigan (j), Utah (j)

Any 3: Michigan (j), Utah (j)

Any 3: Louisiana

Any 4: Louisiana

NV 2: Illinois

NV 3: Illinois

DISCRETIONARY LIFE SENTENCE (cont.)

1910

Any: Washington, Louisiana, Maine, Utah, Michigan, Arizona (m), Canal Zone (m), Puerto Rico (m), North Dakota (m), South Dakota (m), Oklahoma (m), Montana (m), California (m)

NV: Illinois

Any 1: Arizona, Canal Zone, Montana, North Dakota, Oklahoma, Puerto Rico, South Dakota, Washington, Maine (j),

Any 2: Michigan (j), Utah (j)

Any 3: Louisiana

NV 1: California (j)

NV 2: Washington, Illinois

Any 2: Arizona (m), Canal Zone (m), Montana (m), North Dakota, Oklahoma (m), Puerto Rico (m), South Dakota (m), Washington, Maine (j)

Any 3: Michigan (j), Utah (j)

Any 4: Louisiana

NV 2: California (j,m)

NV 3: Washington, Illinois

Any: Washington, Nevada, Louisiana, Maine, Utah, Michigan, Arizona (m), Canal Zone (m), Puerto Rico (m), North Dakota (m), South Dakota (m), Oklahoma (m), Montana (m), California (m)

NV: Illinois

Any 1: Arizona, Canal Zone, Montana, North Dakota, Oklahoma, Puerto Rico, South Dakota, Washington, Maine (j)

Any 2: Nevada, Michigan (j), Utah (j)

Any 3: Louisiana

NV 1: California (j)

NV 2: Washington, Illinois

NV 3: Nevada

Any 2: Arizona (m), Canal Zone (m), Montana (m), Oklahoma (m), Puerto Rico (m), South Dakota (m), Washington, Maine (j), North Dakota (m)

Any 3: Nevada, Michigan (j), Utah (j)

Any 4: Louisiana

NV 2: California (j,m)

NV 3: Washington, Illinois

NV 4: Nevada

DISCRETIONARY LIFE SENTENCE (cont.)

1920

Any: Washington, Nevada, Louisiana, Maine, Utah, Michigan, Arizona (m), Canal Zone (m), Puerto Rico (m), North Dakota (m), South Dakota (m), Oklahoma (m), Montana (m), California (m), Virginia (s)

NV: Illinois

Any 1: Arizona, Canal Zone, Montana, North Dakota, Oklahoma, Puerto Rico, South Dakota, Washington, Maine (j)

Any 2: Nevada, Michigan (j), Utah (j), Virginia (j)

Any 3: Louisiana

NV 1: California (j)

NV 2: Washington, Illinois

NV 3: Nevada

Any 2: Arizona (m), Canal Zone (m), Montana (m), North Dakota (m), Oklahoma (m), Puerto Rico (m), South Dakota (m), Washington, Maine (j),

Any 3: Nevada, Michigan (j), Utah (j), Virginia (j,s)

Any 4: Louisiana

NV 2: California (j,m)

NV 3: Washington, Illinois

NV 4: Nevada

1925

Any: Washington, Idaho, Nevada, Louisiana, Maine, Utah, Nebraska, Michigan, California, Arizona (m), Canal Zone (m), Puerto Rico (m), North Dakota (m), South Dakota (m), Oklahoma (m), Montana (m), Virgin Islands (m), California (m), Virginia (s)

NV: Illinois

Any 1: Arizona, Canal Zone, Montana, North Dakota, Oklahoma, Puerto Rico, South Dakota, Virgin Islands, Washington, ington, Maine (j),

Any 2: Idaho, Nevada, Michigan (j), Nebraska (j), Utah (j), Virginia (j)

Any 3: Louisiana

NV 1: California (j)

Any 2: Arizona (m), Canal Zone (m), Montana (m), North Dakota (m), Oklahoma (m), Puerto Rico (m), Virgin Islands (m), Washington, Maine (j), South Dakota (m), District of Columbia

Any 3: Idaho, Nevada, Michigan (j), Nebraska (j), Utah (j), Virginia (j,s)

Any 4: Louisiana

NV 2: California (j,m)

DISCRETIONARY LIFE SENTENCE (cont.)

1925 (cont.)

NV 2: Washington, Illinois

NV 3: Nevada

SV 2: California

NV 3: Washington, Illinois

NV 4: Nevada

SV 3: California

1930

Any 1: Arizona, Canal Zone, Kansas, Montana,
Oklahoma, Puerto Rico, Virgin Islands,
Washington, Maine (j)

Any 2: Idaho, Nevada, Nebraska (j), Utah (j),
Virginia (j)

Any 3: Minnesota, New Jersey, South Dakota

NV 1: California (j)

NV 2: Washington, Illinois

NV 3: Nevada, North Dakota

SV 3: Pennsylvania (t)

Any 2: Arizona (m), Canal Zone (m), Kansas,
Montana (m), Oklahoma (m), Puerto
Rico (m), Virgin Islands (m), Wash-
ington, Maine (j)

Any 3: Idaho, Nevada, Nebraska (j), Utah (j),
Virginia (j,s)

Any 4: Minnesota, New Jersey, South Dakota

NV 2: California (j,m)

NV 3: Washington, Illinois

NV 4: Nevada, North Dakota

SV 4: Pennsylvania (t)

1935

Any 1: Arizona, Canal Zone, Kansas,
Montana, Oklahoma, Puerto Rico, Virgin
Islands, Washington, Maine (j)

Any 2: Arizona (m), Canal Zone (m), Kansas,
Montana (m), Oklahoma (m), Puerto
Rico (m), Virgin Islands (m), Wash-
ington, Maine (j)

Any: Kansas, Washington, Idaho, Nevada,
Minnesota, New Jersey, South Dakota,
Maine, Utah, Nebraska, Arizona (m),
Canal Zone (m), Puerto Rico (m),
Oklahoma (m), Montana (m), Virgin
Islands (m), California (m), Vir-
ginia (s)

NV: Illinois, North Dakota

SV: Pennsylvania (t)

Any: Kansas, Washington, Idaho, Nevada,
Minnesota, New Jersey, South Dakota,
Maine, Utah, Nebraska, Arizona (m),
Canal Zone (m), Puerto Rico (m),

DISCRETIONARY LIFE SENTENCE (cont.)

1925 (cont.)

Oklahoma (m), Montana (m), Virgin Islands (m), Virginia (s)	Any 2: Idaho, Nevada, Nebraska (j), Utah (j), Virginia (j)	Any 3: Idaho, Nevada, Nebraska (j), Utah (j), Virginia (j,s)
NV: Illinois, North Dakota, New York	Any 3: Minnesota, New Jersey, South Dakota	Any 4: Minnesota, New Jersey, South Dakota
SV: Pennsylvania (t)	NV 2: Washington, Illinois	NV 3: Washington, Illinois
	NV 3: Nevada, New York, North Dakota	NV 4: Nevada, New York, North Dakota,
	SV 3: Pennsylvania (t)	SV 4: Pennsylvania (t)

1940

Any: Kansas, Washington, Idaho, Nevada, Minnesota, New Jersey, South Dakota, Maine, Utah, Arizona (m), Canal Zone (m), Puerto Rico (m), Oklahoma (m), Montana (m), Virgin Islands (m), Virginia (s)	Any 1: Arizona, Canal Zone, Kansas, Montana, Oklahoma, Puerto Rico, Virgin Islands, Washington, Maine (j)	Any 2: Arizona (m), Canal Zone (m), Kansas, Montana (m), Oklahoma (m), Puerto Rico (m), Virgin Islands (m), Washington, Maine (j)
NV: Illinois, North Dakota, New York	Any 2: Idaho, Kansas, Nevada, Utah (j), Virginia (j)	Any 3: Idaho, Kansas, Nevada, Utah (j), Virginia (j,s)
SV: Pennsylvania (t)	Any 3: Minnesota, New Jersey, South Dakota	Any 4: Minnesota, New Jersey, South Dakota
	NV 2: Washington, Illinois	NV 3: Washington, Illinois
	NV 3: Nevada, New York, North Dakota	NV 4: Nevada, New York, North Dakota
	SV 3: Pennsylvania (t)	SV 4: Pennsylvania (t)

1945

Any: Kansas, Washington, Idaho, Nevada, Minnesota, South Dakota, Maine,	Any 1: Arizona, Canal Zone, Kansas, Montana, Oklahoma, Puerto Rico, Virgin	Any 2: Arizona (m), Canal Zone (m), Kansas, Montana (m), Puerto Rico (m), Virgin
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DISCRETIONARY LIFE SENTENCE (cont.)

1935 (cont.)

Utah, Louisiana, Arizona (m), Canal Zone (m), Puerto Rico (m), Oklahoma (m), Montana (m), Virgin Islands (m), Virginia (s)	Islands, Washington, Maine (j)	Islands (m), Washington, Maine (j), Oklahoma (m)
NV: Illinois, North Dakota, New York	Any 2: Idaho, Kansas, Nevada, Utah (j), Virginia (j)	Any 3: Idaho, Kansas, Nevada, Utah (j), Virginia (j,s)
SV: Pennsylvania (t)	Any 3: Minnesota, South Dakota, Louisiana (t)	Any 4: Minnesota, South Dakota, Louisiana (t)
	NV 2: Washington, Illinois	NV 3: Washington, Illinois
	NV 3: Nevada, New York, North Dakota	NV 4: Nevada, New York, North Dakota
	SV 3: Pennsylvania (t)	SV 4: Pennsylvania (t)

1950

Any: Kansas, Washington, Idaho, Nevada, Minnesota, Vermont, South Dakota, Oregon, Maine, Utah, Louisiana, Arizona (m), Canal Zone (m), Puerto Rico (m), Oklahoma (m), Montana (m), Virgin Islands (m), Michigan (m), Virginia (s)	Any 1: Arizona, Canal Zone, Kansas, Montana, Oklahoma, Puerto Rico, Virgin Islands, Washington, Maine (j)	Any 2: Arizona (m), Canal Zone (m), Montana (m), Oklahoma (m), Kansas, Puerto Rico (m), Virgin Islands (m), Washington, Maine (j)
NV: Illinois, North Dakota, New York	Any 2: Idaho, Kansas, Nevada, Utah (j), Virginia (j)	Any 3: Idaho, Kansas, Nevada, Utah (j), Virginia (j,s)
SV: Pennsylvania (t)	Any 3: Michigan, Minnesota, Oregon, South Dakota, Vermont, Louisiana (t)	Any 4: Michigan (m), Minnesota, Oregon, South Dakota, Vermont, Louisiana (t),
	NV 2: Washington, Illinois	NV 3: Washington, Illinois
	NV 3: Nevada, New York, North Dakota	NV 4: Nevada, New York, North Dakota
	SV 3: Pennsylvania (t)	SV 4: Pennsylvania (t)

DISCRETIONARY LIFE SENTENCE (cont.)

1955

Any: Arkansas, Kansas, Washington, Idaho, Nevada, Delaware, Minnesota, Vermont, New Jersey, South Dakota, Oregon, Maine, Utah, Louisiana, Canal Zone (m), Puerto Rico (m), Oklahoma (m), Montana (m), Arizona (m), Virgin Islands (m), Michigan (m), Virginia (s)

NV: Illinois, North Dakota, New York

SV: Pennsylvania (t)

V: Oregon

Any 1: Arizona, Arkansas, Canal Zone, Kansas, Montana, Oklahoma, Puerto Rico, Virgin Islands, Washington, Maine (j)

Any 2: Arkansas, Idaho, Kansas, Nevada, Utah (j), Virginia (j)

Any 3: Arkansas, Delaware, Michigan, Minnesota, New Jersey, Oregon, South Dakota, Vermont, Louisiana (t)

NV 2: Washington, Illinois

NV 3: Nevada, New York, North Dakota

SV 2: New York

SV 3: Pennsylvania (t)

V 1: Oregon

Any 2: Arizona (m), Arkansas, Canal Zone (m), Kansas, Montana (m), Oklahoma (m), Puerto Rico (m), Virgin Islands (m), Washington, Maine (j)

Any 3: Arkansas, Idaho, Kansas, Nevada, Utah (j), Virginia (j,s)

Any 4: Arkansas, Delaware, Michigan (m), New Jersey, Oregon, South Dakota, Vermont, Louisiana (t), Minnesota

NV 3: Washington, Illinois

NV 4: Nevada, New York, North Dakota

SV 3: New York

SV 4: Pennsylvania (t)

V 2: Oregon

1960

Any: Arkansas, Kansas, Washington, Idaho, Virgin Islands, Nevada, Delaware, Minnesota, Vermont, New Jersey, South Dakota, Oregon, Maine, Utah, Louisiana, Canal Zone (m), Puerto Rico (m), Oklahoma (m), Montana (m), Arizona (m), Michigan (m), Virginia (s)

Any 1: Arizona, Arkansas, Canal Zone, Kansas, Montana, Oklahoma, Puerto Rico, Washington, Maine (j)

Any 2: Arkansas, Idaho, Kansas, Nevada, Virgin Islands, Utah (j), Virginia (j)

Any 2: Arizona (m), Arkansas, Canal Zone (m), Kansas, Montana (m), Oklahoma (m), Puerto Rico (m), Washington, Maine (j)

Any 3: Arkansas, Idaho, Kansas, Nevada, Virgin Islands, Utah (j), Virginia (j,s)

DISCRETIONARY LIFE SENTENCE (cont.)

1960 (cont.)

NV: Illinois, North Dakota, New York

SV: Pennsylvania (t)

V: Oregon

Any 3: Arkansas, Delaware, Michigan, Minnesota, New Jersey, Oregon, South Dakota, Vermont, Louisiana (t)

NV 2: Washington, Illinois

NV 3: Nevada, New York, North Dakota

SV 2: New York

SV 3: Pennsylvania (t)

V 1: Oregon

Any 4: Arkansas, Delaware, Michigan (m), Minnesota, New Jersey, Oregon, South Dakota, Vermont, Louisiana (t)

NV 3: Washington, Illinois

NV 4: Nevada, New York, North Dakota

SV 3: New York

SV 4: Pennsylvania (t)

V 2: Oregon

1965

Any: Arkansas, Kansas, Washington, Idaho, Virgin Islands, Nevada, Alaska, Delaware, Vermont, New Jersey, South Dakota, Oregon, Maine, Utah, Louisiana, Canal Zone (m), Puerto Rico (m), Oklahoma (m), Montana (m), Arizona (m), Michigan (m), Virginia (s)

NV: North Dakota, New York

SV: Pennsylvania (t)

Any 1: Arizona, Arkansas, Canal Zone, Kansas, Montana, Oklahoma, Puerto Rico, Washington, Maine (j)

Any 2: Arkansas, Idaho, Kansas, Nevada, Virgin Islands, Utah (j), Virginia (j)

Any 3: Alaska, Arkansas, Delaware, Michigan, New Jersey, Oregon, South Dakota, Vermont, Louisiana (t)

NV 2: Washington

NV 3: Nevada, New York, North Dakota

SV 2: New York

SV 3: Pennsylvania (t)

Any 2: Arizona (m), Arkansas, Canal Zone (m), Kansas, Montana (m), Oklahoma (m), Puerto Rico (m), Washington, Maine (j)

Any 3: Arkansas, Idaho, Kansas, Nevada, Virgin Islands, Utah (j), Virginia (j,s)

Any 4: Alaska, Arkansas, Delaware, Michigan (m), New Jersey, Oregon, South Dakota, Vermont, Louisiana (t)

NV 3: Washington

NV 4: Nevada, New York, North Dakota

SV 3: New York

SV 4: Pennsylvania (t)

DISCRETIONARY LIFE SENTENCE (cont.)

1970

Any:	Kansas, Washington, Idaho, Virgin Islands, New York, Nevada, Alaska, Delaware, North Carolina, Vermont, New Jersey, South Dakota, Oregon, Maine, Utah, Louisiana, Canal Zone (m), Puerto Rico (m), Nebraska (j), Oklahoma (m), Montana (m), Arizona (m), Michigan (m)	Any 1: Arizona, Canal Zone, Kansas, Montana, Oklahoma, Puerto Rico, Virginia, Washington, Maine (j),	Any 2: Arizona (m), Canal Zone (m), Kansas, Montana (m), Oklahoma (m), Puerto Rico (m), Washington, Maine (j)
NV:	North Dakota, Virginia (s)	Any 2: Idaho, Kansas, Nevada, New York, Virgin Islands, Utah (j), Nebraska (j)	Any 3: Idaho, Kansas, Nevada, New York, Virgin Islands, Utah (j), Nebraska (j)
SV:	Pennsylvania (t)	Any 3: Alaska, Delaware, Michigan, New Jersey, North Carolina, Oregon, South Dakota, Vermont, Louisiana (t)	Any 4: Alaska, Delaware, Michigan (m), New Jersey, North Carolina, Oregon, South Dakota, Vermont, Louisiana (t)
V:	Illinois, Connecticut, Oregon	NV 2: Washington	NV 2: Virginia (s)
		NV 3: Nevada, North Dakota	NV 3: Washington
		SV 3: Pennsylvania (t)	NV 4: Nevada, North Dakota
		V 1: Connecticut, Illinois, Oregon	SV 4: Pennsylvania (t)
		V 2: Connecticut	V 2: Connecticut, Illinois, Oregon
		V 3: Oregon	V 3: Connecticut
			V 4: Oregon

1975

Any:	Washington, District of Columbia, Idaho, Kansas, Virgin Islands, Alaska, North Carolina, Vermont, New Jersey, South Dakota, Maine, New York, Louisi-	Any 1: Arizona, Canal Zone, Oklahoma, Texas, Virginia, Washington, Maine (j), Florida (t), Montana (j,m,t)	Any 2: Arizona (m), Canal Zone (m), Oklahoma (m), Washington, Maine (j), Montana (j,m,t)
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DISCRETIONARY LIFE SENTENCE (cont.)

1975 (cont.)

ana, Delaware, Montana, Canal Zone (m), Oklahoma (m), Arizona (m), Nebraska (j), Michigan (m)	Any 2: Connecticut, District of Columbia, Hawaii, Idaho, Kansas, Virgin Islands, Kentucky (j), New York (m,t), Nebraska (j)	Any 3: District of Columbia, Idaho, Kansas, Virgin Islands, New York (m,t), Nebraska (j)
NV: North Dakota, Virginia (s)	Any 3: Alaska, Michigan, New Jersey, North Carolina, South Dakota, Vermont, Louisiana (t)	Any 4: Alaska, Michigan (m), New Jersey, North Carolina, South Dakota, Vermont, Louisiana (t)
SV: Virgin Islands, Pennsylvania (t)	NV 2: Washington	NV 2: Virginia (s)
V: Texas, Hawaii, Florida, Illinois, Oregon, Connecticut	NV 3: Delaware, North Dakota	NV 3: Washington
O: Connecticut, Kentucky	SV 2: Virgin Islands	SV 3: Virgin Islands
	SV 3: Pennsylvania (t)	SV 4: Pennsylvania (t)
	V 1: Illinois	V 2: Texas, Florida (t), Illinois
	V 2: Connecticut (j)	V 3: Hawaii, Connecticut (j)
	V 3: Oregon	V 4: Oregon
		O 3: Kentucky (j), Connecticut

1980

Any: Washington, District of Columbia, Idaho, Virgin Islands, North Carolina, Vermont, Nevada, Puerto Rico, Oklahoma, Louisiana, Montana, Washington, Delaware, Nebraska	Any 1: Alabama, Canal Zone, Mississippi, Texas, Washington, Florida (t), Oklahoma (t), Puerto Rico (t), Montana (j,m,t)	Any 2: Canal Zone (m), Mississippi (m). Washington, Oklahoma (m,t), Puerto Rico (t), Montana (j,m,t)
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DISCRETIONARY LIFE SENTENCE (cont.)

1980 (cont.)

(j), Canal Zone (m), Mississippi (m), Michigan (m), Oklahoma (m)	Any 2: Arkansas, Connecticut, District of Columbia, Hawaii, Idaho, Nebraska (j), Virgin Islands, Kentucky (j,t), Florida (m,t), Oklahoma (t), Puerto Rico (t)	Any 3: District of Columbia, Oklahoma (t), Puerto Rico (t), Idaho, Virgin Islands, Nebraska (j)
NV: New York	Any 3: Arkansas, Michigan, Nevada, North Carolina, Vermont, Louisiana (t)	Any 4: Michigan (m), Nevada, North Carolina, Vermont, Louisiana (t)
SV: Virgin Islands,		
V: Alabama, Texas, Arkansas, Hawaii, Florida, North Dakota, Missouri, Oregon, Connecticut, New York	NV 2: Washington, New York (m,t) NV 3: Delaware, North Dakota	NV 3: Washington, New York (m,t) NV 4: Delaware, North Dakota
O: Connecticut, Kentucky, Utah	SV 2: Utah, Virgin Islands V 1: Hawaii, Missouri, North Dakota V 2: Missouri, Connecticut (j), New York (m,t) V 3: Oregon O 1: Puerto Rico (t) O 2: North Dakota, Puerto Rico (t)	NV 6: Nevada SV 3: Virgin Islands V 2: Alabama, Texas, Florida (t), Hawaii, Missouri, North Dakota V 3: Arkansas, Hawaii, Idaho, North Dakota, Florida (m,t), Missouri, Connecticut (j), New York (m,t) V 4: Arkansas, Oregon O 2: Puerto Rico (t) O 3: Connecticut, Kentucky (j,t), North Dakota, Puerto Rico (t), Utah

**HABITUAL OFFENDER STATUTES,
CATEGORIZED BY LENGTH OF PUNISHMENT AND TYPE OF OFFENSES: 1900-1980**

MANDATORY SENTENCE: LESS THAN LIFE

PRESENT

PAST

PRESENT AND PAST

1900

Any: Kansas, Minnesota, Kentucky, New York, Missouri, Georgia, Massachusetts, Utah, West Virginia, Rhode Island, Michigan, South Dakota, Oklahoma, California, Montana, New York, North Dakota, Alabama, Texas, North Dakota (m), South Dakota (m), Oklahoma (m), California (m), Connecticut (m), Virginia (s), Montana (m)

NV: North Dakota, Illinois

O: Iowa

Any 1: California, Kansas, Kentucky, Minnesota, Missouri, Montana, New York, North Dakota, Oklahoma, South Dakota, Georgia (j), Virginia (j), West Virginia (j), West Virginia (j)

Any 2: Massachusetts (j), Michigan (j), Rhode Island (j), Utah (j), Connecticut (m)

NV 1: California, Illinois, Montana, New York, North Dakota, Oklahoma, South Dakota

O 1: Alabama, Texas

O 2: Iowa

Any 2: Kansas, Minnesota, Kentucky, New York, Missouri, Georgia (j), West Virginia (j), North Dakota (m), South Dakota (m), Oklahoma (m), California (m), Virginia (j,s), Montana (m)

Any 3: Massachusetts (j), Utah (j), Rhode Island (j), Michigan (j), Connecticut (m)

NV 2: South Dakota, Oklahoma, California, Montana, New York, North Dakota, Illinois

O 2: Alabama, Texas

O 3: Iowa

1905

Any: Kansas, Minnesota, Washington, Kentucky, New York, Missouri, Georgia, Canal Zone, Massachusetts, Utah, West Virginia, Rhode

Any 1: Arizona, California, Canal Zone, Kansas, Kentucky, Minnesota, Missouri, Montana, New York, North Dakota, Oklahoma,

Any 2: Kansas, Minnesota, Washington, Kentucky, New York, Missouri, Georgia (j), West Virginia (j), Arizona (m), Canal Zone (m)

MANDATORY SENTENCE: LESS THAN LIFE

PRESENT

PAST

PRESENT AND PAST

Island, Iowa, Puerto Rico, Michigan, Arizona, South Dakota, Oklahoma, Montana, New York, North Dakota, Alabama, Texas, Arizona (m), Canal Zone (m), Puerto Rico (m), North Dakota (m), South Dakota (m), Oklahoma (m), California (m), Connecticut (s), Virginia (s), Montana (m)

NV: North Dakota, Illinois

O: Iowa

1905 (cont.)

Puerto Rico, South Dakota, Washington, Georgia (j), Virginia (j), West Virginia (j)

Any 2: Canal Zone, Connecticut (j), Massachusetts (j), Michigan (j), Puerto Rico (j), Rhode Island (j), Iowa (j), Utah (j)

NV 1: Arizona, Canal Zone, Illinois, Montana, New York, North Dakota, Oklahoma, Puerto Rico, South Dakota

NV 2: Illinois

O 1: Alabama, Texas

O 2: Iowa

Puerto Rico (m), North Dakota (m), South Dakota (m), Oklahoma (m) California (m), Virginia (s,j), Montana (t)

Any 3: Canal Zone (j), Massachusetts (j), Utah (j), Rhode Island (j), Iowa (j), Puerto Rico (j), Michigan (j), Connecticut (j,s)

NV 2: Arizona, Canal Zone, Puerto Rico, South Dakota, Oklahoma, Montana, New York, North Dakota, Illinois

O 2: Alabama, Texas

O 3: Iowa

1910

Any: Kansas, Washington, Kentucky, New York, Minnesota, Missouri, Georgia, Canal Zone, Massachusetts, Utah, West Virginia, Rhode Island, Pennsylvania, Iowa, Puerto Rico, Michigan, California, Arizona, South Dakota, Oklahoma, Montana, North Dakota, Alabama, Texas, Arizona (m), Canal Zone (m), Puerto Rico (m), North Dakota (m), South Dakota (m), Oklahoma (m), California (m), Connecticut (s), Virginia (s), Montana (t)

Any 1: Arizona, Canal Zone, Kansas, Kentucky, Minnesota, Missouri, Montana, New York, North Dakota, Oklahoma, Puerto Rico; South Dakota, Washington, California (j), Georgia (j), Virginia (j), West Virginia (j)

Any 2: Kansas, Washington, Kentucky, New York, Minnesota, Missouri, Georgia (j), West Virginia (j), California (j), Arizona (m), Canal Zone (m), Puerto Rico (m), North Dakota (m), South Dakota (m), Oklahoma (m), Virginia (s,j), Montana (m)

MANDATORY SENTENCE: LESS THAN LIFE

PRESENT

PAST

PRESENT AND PAST

1910 (cont.)

NV: North Dakota, Illinois
O: Iowa

Any 2: Canal Zone (j), Connecticut (j), Iowa (j), Massachusetts (j), Michigan (j), Pennsylvania (j), Puerto Rico (j), Rhode Island (j), Utah (j)

NV 1: Arizona, Canal Zone, Illinois, Montana, New York, North Dakota, Oklahoma, Puerto Rico, South Dakota, California (j)

NV 2: Washington, Illinois

O 1: Alabama, Texas

O 2: Iowa

Any 3: Canal Zone (j), Massachusetts (j), Utah (j), Rhode Island (j), Pennsylvania (j), Iowa (j), Puerto Rico (j), Michigan (j), Connecticut (j,s)

NV 2: Arizona, Canal Zone, Puerto Rico, South Dakota, Oklahoma, Montana, New York, North Dakota, California (j,m), Illinois

NV 3: Washington, Illinois

O 3: Alabama, Texas

1915

Any: Kansas, Kentucky, Minnesota, Missouri, Nevada, New York, Washington, California, Canal Zone, Georgia, Iowa, Massachusetts, Michigan, Pennsylvania, Puerto Rico, Rhode Island, Utah, West Virginia, Montana, North Dakota, Oklahoma, South Dakota, Alabama, Texas, Arizona (m), Canal Zone (m), Montana (m), North Dakota (m), Oklahoma (m), Puerto Rico (m), South Dakota (m), California (m), Connecticut (s), Virginia (s)

Any 1: Arizona, Canal Zone, Kansas, Kentucky, Minnesota, Missouri, Montana, New York, North Dakota, Oklahoma, Puerto Rico, South Dakota, Washington, California (j) Georgia (j), Virginia (j), Washington, California (j), Georgia (j), Virginia (j), West Virginia (j)

Any 2: Nevada, Canal Zone (j), Connecticut (j), Iowa (j), Massachusetts (j), Michigan (j), Pennsylvania (j), Puerto Rico (j), Rhode Island (j), Utah (j)

NV 1: Canal Zone, Illinois, Montana, New York, North Dakota, Oklahoma, Puerto Rico, South Dakota, California (j)

Any 2: Kansas, Kentucky, Minnesota, Missouri, New York, Washington, California (j), Georgia (j), West Virginia (j), Arizona(m) Canal Zone (m), Montana (m), North Dakota (m), Oklahoma (m), Puerto Rico (m), South Dakota (m), Virginia (j,s)

Any 3: Nevada, Canal Zone (j), Iowa (j), Massachusetts (j), Michigan (j), Pennsylvania (j), Rhode Island (j), Utah (j), Puerto Rico (j), Connecticut (j,s)

NV 2: Arizona, Canal Zone, Montana, New York, North Dakota, Oklahoma, Puerto Rico, South Dakota, California (j,m), Illinois

NV: North Dakota, Illinois
O: Iowa

MANDATORY SENTENCE: LESS THAN LIFE

PRESENT

PAST

PRESENT AND PAST

1915 (cont.)

NV 2: Washington, Illinois

NV 3: Nevada

O 1: Alabama, Texas

O 2: Iowa

NV 3: Washington, Illinois

NV 4: Nevada

O 2: Alabama, Texas

O 3: Iowa

1920

Any: Kansas, Kentucky, Minnesota, Missouri, Nevada, New York, Washington, California, Georgia, Iowa, Massachusetts, Michigan, Pennsylvania, Puerto Rico, Utah, West Virginia, Canal Zone, Montana, North Dakota, Oklahoma, South Dakota, Alabama, Texas, Arizona (m), Canal Zone (m), Montana (m), North Dakota (m), Oklahoma (m), Puerto Rico, South Dakota (m), California (m), Connecticut (s)

Any 1: Arizona, Canal Zone, Kansas, Kentucky, Minnesota, Missouri, Montana, New York, North Dakota, Oklahoma, Puerto Rico, South Dakota, Washington, California (j), Georgia (j), West Virginia (j)

Any 2: Nevada, Canal Zone (j), Connecticut (j), Iowa (j), Massachusetts (j), Michigan (j), Pennsylvania (j), Puerto Rico (j), Utah (j)

NV 1: Canal Zone, Illinois, Montana, New York, North Dakota, Oklahoma, Puerto Rico, South Dakota, California (j)

NV 2: Washington, Illinois

NV 3: Nevada

O 1: Alabama, Texas

O 2: Iowa

Any 2: Kansas, Kentucky, Minnesota, Missouri, New York, Washington, California (j), Georgia (j), West Virginia (j), Arizona (m), Canal Zone (m), Montana (m), North Dakota (m), Oklahoma (m), Puerto Rico (m), South Dakota (m)

Any 3: Nevada, Pennsylvania (j), Iowa (j), Massachusetts (j), Puerto Rico (j), Michigan (j), Utah (j), Connecticut (s,j), Canal Zone (j)

NV 2: Canal Zone, Montana, New York, North Dakota, Oklahoma, Puerto Rico, South Dakota, California (j,m), Illinois

NV 3: Washington, Illinois

NV 4: Nevada

O 2: Alabama, Texas

O 3: Iowa

MANDATORY SENTENCE: LESS THAN LIFE

PRESENT

Any: Idaho, Kansas, Kentucky, Minnesota, Missouri, Nevada, New York, Washington, California, Canal Zone, Georgia, Massachusetts, Michigan, Nebraska, Pennsylvania, Puerto Rico, Utah, Virgin Islands, West Virginia, Montana, North Dakota, Alabama, Texas, Arizona (m), Canal Zone (m), Montana (m), North Dakota (m), Oklahoma (m), Puerto Rico (m), South Dakota (m), California (m), Connecticut (s), Virgin Islands (m)

NV: North Dakota, Illinois

Any: Florida, Idaho, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Nevada, New Jersey, New Mexico, New York, Oregon, South Dakota, Washington, California, Canal Zone, Georgia, Massachusetts, Nebraska,

PAST

1925

Any 1: Arizona, Canal Zone, Kansas, Kentucky, Minnesota, Missouri, Montana, New York, North Dakota, Oklahoma, Puerto Rico, South Dakota, Virgin Islands, Washington, California (j), Georgia (j), West Virginia (j)

Any 2: Idaho, Nevada, Canal Zone (j), Connecticut (j), Massachusetts (j), Nebraska (j), Pennsylvania (j), Puerto Rico (j), Utah (j), Michigan (j)

NV 1: Canal Zone, Illinois, Montana, North Dakota, Oklahoma, Puerto Rico, South Dakota, California (j), Virgin Islands

NV 2: Washington, Canal Zone, Illinois

NV 3: Nevada

SV 2: California

O 1: Alabama, Texas

Any 2: Kansas, Kentucky, Minnesota, Missouri, New York, Washington, California (j), Georgia (j), West Virginia (j), Arizona (m), Canal Zone (m), Montana (m) North Dakota (m), Oklahoma (m), Puerto Rico (m), Virgin Islands (m) South Dakota (m)

Any 3: Idaho, Nevada, Canal Zone (j), Massachusetts (j), Michigan (j), Nebraska (j), Pennsylvania (j), Puerto Rico (j), Utah (j), Connecticut (s,j)

NV 2: Canal Zone, Montana, North Dakota, Oklahoma, Puerto Rico, South Dakota, California (j,m) Illinois Virgin Islands

NV 3: Washington, Illinois

NV 4: Nevada

SV 3: California

O 2: Alabama, Texas

1930

Any 1: Arizona, Canal Zone, Florida, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, Oklahoma, Oregon, Puerto Rico, South Dakota, Washington, Virgin Islands, California (j), Georgia (j), West Virginia

Any 2: Florida, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, New Jersey, New Mexico, Oregon, New York, South Dakota, Washington, California (j), West Virginia (j), Georgia (j), Arizona (m), Canal Zone (m), Virgin

MANDATORY SENTENCE: LESS THAN LIFE

PRESENT

Puerto Rico, Utah, West Virginia,
Montana, Oklahoma, Alabama, Texas,
Virgin Islands, Arizona (m), Conn-
necticut (m), Michigan (m), California
(m), Canal Zone (m), Puerto Rico (m),
Virgin Islands (m), Montana (m),
Oklahoma (m), Connecticut (s)

NV: Illinois

V: Missouri

PAST

1930 (cont.)

Any 2: Idaho, Louisiana, Michigan, Nevada, New
Mexico, Oregon, Canal Zone (j), Connecti-
cut, (j), Massachusetts (j), Nebraska (j),
New Jersey (j), Puerto Rico (j), Utah (j)

Any 3: Michigan, Minnesota

NV 1: Canal Zone, Illinois, Montana, Oklahoma,
Puerto Rico, California (j), Virgin Islands

NV 2: Washington, Illinois

NV 3: Nevada

V 1: Missouri

V 2: Missouri

O 1: Alabama, Colorado, Texas

O 2: Colorado, Ohio

TABLE 6C (cont.)

PRESENT AND PAST

Islands (m), Montana (m), Oklahoma (m),
Puerto Rico (m), Connecticut (j,s)

Any 3: Idaho, Michigan, Nevada, New Mexico,
Louisiana, Oregon, Canal Zone (j), Mass-
achusetts (j), Nebraska (j), New Jer-
sey (j), Puerto Rico (j), Utah (j)

Any 4: Minnesota, Michigan (m)

NV 2: Canal Zone, Montana, Oklahoma, Puerto
Rico, Virgin Islands, California (j,m),
Illinois

NV 3: Washington, Illinois

NV 4: Nevada

V 2: Missouri

V 3: Missouri

O 2: Alabama, Texas, Colorado

O 3: Colorado

O 4: Ohio

1935

Any: Florida, Idaho, Kansas, Kentucky,
Louisiana, Michigan, Minnesota, Missouri,
Nevada, New Jersey, New Mexico, New York,

Any 1: Arizona, Canal Zone, Florida, Kansas,
Kentucky, Louisiana, Michigan, Minnesota,
Missouri, Montana, New Jersey, New Mexico,

Any 2: Florida, Kansas, Kentucky, Louisiana,
Michigan, Minnesota, Missouri, New
Jersey, New Mexico, New York, Oregon,

MANDATORY SENTENCE: LESS THAN LIFE

PRESENT

PAST

PRESENT AND PAST

Oregon, South Dakota, Washington, Canal Zone, Georgia, Massachusetts, Nebraska, Puerto Rico, Utah, West Virginia, Montana, Oklahoma, Alabama, Texas, Virgin Islands, Arizona (m), Canal Zone (m), Michigan (m), Montana (m), Oklahoma (m), Puerto Rico (m), California (m), Virgin Islands (m), Connecticut (s)

New York, Oklahoma, Oregon, Puerto Rico, South Dakota, Washington, Virgin Islands, Georgia (j), West Virginia (j)

South Dakota, Washington, Georgia (j), West Virginia (j), Arizona (m), Canal Zone (m), Montana (m), Oklahoma (m), Puerto Rico (m), Virgin Islands (m)

NV: Illinois, New York

Any 2: Idaho, Louisiana, Michigan, Nevada, New Mexico, Oregon, Canal Zone (j), Connecticut (j), Massachusetts (j), Nebraska (j), New Jersey (j), Puerto Rico (j), Utah (j)

Any 3: Idaho, Louisiana, Michigan, Nevada, New Mexico, Oregon, Canal Zone (j), Massachusetts (j), Nebraska (j), New Jersey (j), Puerto Rico (j), Utah (j), Connecticut (s,j)

V: Missouri

O: Colorado, Ohio

Any 3: Michigan, Minnesota

Any 4: Minnesota, Michigan (m)

NV 1: California, Canal Zone, Illinois, Montana, Oklahoma, Puerto Rico, Virgin Islands

NV 2: Canal Zone, Montana, Virgin Islands, Oklahoma, Puerto Rico, California (m), Illinois

NV 2: Washington, Illinois

NV 3: Illinois, Washington

NV 3: Nevada, New York

NV 4: New York, Nevada

V 1: Missouri

V 2: Missouri

V 2: Missouri

V 3: Missouri

O 1: Alabama, Colorado, Texas

O 2: Alabama, Texas, Colorado

O 2: Colorado, Ohio

O 3: Colorado, Ohio

MANDATORY SENTENCE: LESS THAN LIFE

PRESENT

PAST

PRESENT AND PAST

1940

Any: Florida, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Nevada, New Jersey, Oregon, Washington, Wyoming, Canal Zone, Georgia, Maine, Nebraska, Puerto Rico, Utah, West Virginia, Montana, Oklahoma, Alabama, Virgin Islands, Texas, Arizona (m), Canal Zone (m), Virgin Islands (m), Michigan (m), Montana, Oklahoma (m), Puerto Rico (m), California (m), Connecticut (s)

NV: Alaska, California, Illinois, New York

V: California, Missouri

O: Colorado, Ohio

Any 1: Arizona, California, Canal Zone, Florida, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, Oklahoma, Virgin Islands, Oregon, Puerto Rico, Washington, Georgia (j), West Virginia (j)

Any 2: Idaho, Kansas, Louisiana, Michigan, Nevada, New Mexico, Oregon, Wyoming, Canal Zone (j) Connecticut (j), Nebraska (j), New Jersey (j), Puerto Rico (j), Utah (j), Massachusetts (j)

Any 3: Michigan, Minnesota

NV 1: Canal Zone, Illinois, Montana, Oklahoma, Virgin Islands, Puerto Rico, California (j)

NV 2: Washington, Illinois

NV 3: Alaska, Nevada, New York

V 1: Missouri

V 2: Missouri

O 1: Alabama, Colorado, Texas

O 2: Colorado, Ohio

Any 2: Florida, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, New Jersey, New York, Oregon, Washington, Georgia (j), West Virginia (j), Arizona (m), Canal Zone (m), Montana (m), Oklahoma (m), Puerto Rico (m), Virgin Islands (m)

Any 3: Idaho, Kansas, Louisiana, Michigan, Nevada, New Mexico, Oregon, Wyoming, Canal Zone (j), Massachusetts (j), Nebraska (j), New Jersey (j), Puerto Rico (j), Utah (j), Connecticut (j,s)

Any 4: Minnesota, Michigan (m)

NV 2: Canal Zone, Montana, Oklahoma, Puerto Rico, California, Illinois, Virgin Islands, California (m,j)

NV 3: Washington, Illinois

NV 4: Nevada, Alaska, New York

V 2: California, Missouri

V 3: Missouri

O 2: Alabama, Texas, Colorado

O 3: Colorado, Ohio

MANDATORY SENTENCE: LESS THAN LIFE

PRESENT

PAST

PRESENT AND PAST

1945

Any: Florida, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nevada, New Mexico, Oregon, Washington, Wyoming, Canal Zone, Georgia, Maine, Nebraska, Puerto Rico, Utah, West Virginia, Louisiana, Nevada, Montana, Oklahoma, Virgin Islands, Alabama, Texas, Arizona (m), Canal Zone (m), Michigan (m), Montana (m), New York (m), Oklahoma (m), Puerto Rico (m), California (m), Virgin Islands (m), Connecticut (s)

NV: Alaska, California, Illinois, New York

V: California, Missouri

O: Colorado, Ohio

Any 1: Arizona, California, Canal Zone, Florida, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, New Mexico, New York, Oklahoma, Oregon, Puerto Rico, Virgin Islands, Washington, Georgia (j), West Virginia (j), Louisiana (t)

Any 2: Idaho, Kansas, Michigan, Nevada, New Mexico, Any 3: Oregon, Wyoming, Canal Zone (j), Connecticut (j), Massachusetts (j), Nebraska (j), Puerto Rico (j), Utah (j), Louisiana (t)

Any 3: Michigan, Minnesota, Louisiana (t)

NV 1: Canal Zone, Illinois, Montana, Virgin Islands, Oklahoma, Puerto Rico, California (j)

NV 2: Washington, Illinois

NV 3: Alaska, Nevada, New York

V 1: Missouri

V 2: Missouri

O 1: Alabama, Colorado, Texas

O 2: Colorado, Ohio

Any 2: Florida, Kansas, Kentucky, Michigan, Minnesota, Missouri, New Mexico, Oregon, Washington, Georgia (j), West Virginia (j), Louisiana (t), Arizona (m), Canal Zone (m), Montana (m), New York (m), Oklahoma (m), Puerto Rico (m), Virgin Islands (m)

Any 3: Idaho, Kansas, Michigan, Nevada, New Mexico, Oregon, Wyoming, Canal Zone (j). Massachusetts (j), Nebraska (j), Puerto Rico (j), Utah (j), Louisiana (t), Connecticut (s,j)

Any 4: Minnesota, Louisiana (t), Michigan (m), Connecticut (j,s)

NV 2: Canal Zone, Montana, Oklahoma, Puerto Rico, California (j,m), California, Illinois, Virgin Islands

NV 3: Washington, Illinois

NV 4: Nevada, Alaska, New York

V 2: California, Missouri

V 3: Missouri

O 2: Alabama, Texas, Colorado

O 3: Colorado, Ohio

MANDATORY SENTENCE: LESS THAN LIFE

PRESENT

PAST

PRESENT AND PAST

1950

Any:	Colorado, Florida, Indiana, Kansas, Kentucky, Minnesota, Missouri, Nevada, New Mexico, Oregon, Washington, Wyoming, Canal Zone, Georgia, Maine, Nebraska, Puerto Rico, Utah, West Virginia, Virgin Islands, Louisiana, Montana, Oklahoma, Alabama, Texas, Arizona (m), Canal Zone (m), Montana (m), New York (m), Oklahoma (m), Puerto Rico (m), California (m), Virgin Islands	Any 1: Arizona, California, Canal Zone, Florida, Kansas, Kentucky, Minnesota, Missouri, Montana, New Mexico, New York, Oklahoma, Puerto Rico, Washington, Virgin Islands, Georgia (j), West Virginia (j), Louisiana (t)	Any 2: Florida, Kansas, Kentucky, Minnesota, Missouri, New Mexico, Washington, Georgia (j), Puerto Rico (j), West Virginia (j), Louisiana (t), Arizona (m), Canal Zone (m), Virgin Islands (m), Montana (m), New York (m), Oklahoma (m), Puerto Rico (m)
NV:	Alaska, California, Illinois, New York	Any 3: Minnesota, Oregon, Louisiana (t)	Any 3: Colorado, Idaho, Kansas, Nevada, New Mexico, Wyoming, Canal Zone (j), Massachusetts (j), Nebraska (j), Puerto Rico (j), Utah (j), Louisiana (t)
V:	California, Missouri	NV 1: Canal Zone, Illinois, Montana, Oklahoma, Virgin Islands, Puerto Rico, California (j)	NV 2: Canal Zone, Montana, Oklahoma, Puerto Rico, California (j,m), California, Illinois, Virgin Islands
O:	Ohio	NV 2: Washington, Illinois NV 3: Alaska, Nevada, New York V 1: Missouri V 2: Missouri O 1: Alabama, Texas O 2: Ohio	NV 3: Washington, Illinois NV 4: Nevada, Alaska, New York V 2: California, Missouri V 3: Missouri O 2: Alabama, Texas O 3: Ohio

MANDATORY SENTENCE: LESS THAN LIFE

PRESENT

Any: Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Minnesota, Missouri, Nevada, New Mexico, New York, Oregon, Washington, Wyoming, Canal Zone, Georgia, Maine, Nebraska, Puerto Rico, Utah, West Virginia, Louisiana, Montana, Virgin Islands, Oklahoma, Alabama, Texas, Arizona (m), Canal Zone (m), Montana (m), Oklahoma (m), Puerto Rico (m), Colorado (m), Virgin Islands (m)

NV: Alaska, California, Illinois, New York

SV: Delaware, New York

V: Colorado, Montana

O: Ohio

PAST

1955

Any 1: Arizona, Arkansas, California, Canal Zone, Florida, Kansas, Kentucky, Minnesota, Missouri, Montana, New Mexico, New York, Oklahoma, Puerto Rico, Washington, Virgin Islands, Georgia (j), West Virginia (j), Louisiana (t)

Any 2: Arkansas, Colorado, Idaho, Kansas, Nevada, New Mexico, Wyoming, Canal Zone (j), Massachusetts (j), Nebraska (j), Puerto Rico (j), Utah (j), Louisiana (t)

Any 3: Louisiana (t), Arkansas, Georgia, Minnesota, Oregon

NV 1: Canal Zone, Illinois, Montana, Oklahoma, Puerto Rico, California (j), Virgin Islands

NV 2: Washington, Illinois

NV 3: Alaska, Nevada, New York

SV 1: Delaware, Missouri

SV 2: Delaware, New York, Missouri

V 1: Missouri

V 2: Missouri

O 1: Alabama, Texas

O 2: Ohio

PRESENT AND PAST

Any 2: Arkansas, Florida, Kansas, Kentucky, Minnesota, Missouri, New Mexico, New York, Washington, West Virginia (j), Georgia (j), Louisiana (t), Arizona (m), Canal Zone (m), Montana (m), Oklahoma (m), Puerto Rico (m), Virgin Islands (m)

Any 3: Arkansas, Colorado, Idaho, Kansas, Nevada, New Mexico, Wyoming, Canal Zone (j), Georgia (j), Massachusetts (j), Nebraska (j), Puerto Rico (j), Utah (j), Louisiana (t)

Any 4: Arkansas, Georgia, Minnesota, Oregon, Louisiana (t)

NV 2: Canal Zone, Montana, Oklahoma, Puerto Rico, California (m,j), California, Illinois, Virgin Islands

NV 3: Washington, Illinois

NV 4: Nevada, Alaska, New York

SV 2: Delaware

SV 3: Delaware, New York

V 2: California, Missouri

V 3: Missouri

O 2: Alabama, Texas

O 3: Ohio

MANDATORY SENTENCE: LESS THAN LIFE

PRESENT

Any: Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Minnesota, Nevada, New Mexico, New York, Oregon, Virgin Island, Washington, Wyoming, Canal Zone, Georgia, Maine, Nebraska, Puerto Rico, Utah, West Virginia, Louisiana, Montana, Oklahoma, Alabama, Texas, Arizona (m), Canal Zone (m), Montana (m), Oklahoma (m), Puerto Rico (m), Wisconsin (m), California (m)

NV: Alaska, California, Illinois, New York

SV: Delaware, New York, South Carolina

V: Colorado, Missouri

O: Ohio

PAST

1960

Any 1: Arizona, Arkansas, California, Canal Zone, Florida, Kansas, Kentucky, Minnesota, Montana, New Mexico, New York, Oklahoma, Puerto Rico, Washington, Georgia (j), West Virginia (j), Louisiana (t), Wisconsin (t)

Any 2: Arkansas, Colorado, Idaho, Kansas, Nevada, New Mexico, Virgin Islands, Wyoming, Canal Zone (j), Massachusetts (j), Nebraska (j), Puerto Rico (j), Utah (j), Louisiana (t)

Any 3: Arkansas, Georgia, Minnesota, Oregon, Louisiana (t)

NV 1: Canal Zone, Illinois, Montana, Oklahoma, Puerto Rico, California (j)

NV 2: Washington, Illinois

NV 3: Alaska, Nevada, New York

SV 1: Delaware

SV 2: Delaware, New York, South Carolina

V 1: Missouri

V 2: Missouri

O 1: Alabama, Texas

O 2: Ohio

PRESENT AND PAST

Any 2: Arkansas, Florida, Kansas, Kentucky, Minnesota, New Mexico, New York, Washington, Georgia (j), West Virginia (j), Louisiana (t), Arizona (m), Canal Zone (m), Montana (m), Oklahoma (m), Puerto Rico (m), Wisconsin (m,t)

Any 3: Arkansas, Colorado, Idaho, Kansas, Nevada, New Mexico, Virgin Islands, Wyoming, Canal Zone (j), Massachusetts (j), Nebraska (j), Puerto Rico (j), Utah (j), Louisiana (t)

Any 4: Arkansas, Georgia, Minnesota, Oregon, Louisiana (t)

NV 2: Canal Zone, Montana, Oklahoma, Puerto Rico, California (j,m), California, Illinois

NV 3: Washington, Illinois

NV 4: Nevada, Alaska, New York

SV 2: Delaware

SV 3: Delaware, New York, South Carolina

V 2: California, Missouri

V 3: Missouri

O 2: Alabama, Texas

O 3: Ohio

MANDATORY SENTENCE: LESS THAN LIFE

PRESENT

Any: Alaska, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Nevada, New Mexico, New York, Oregon, Virgin Islands, Washington, Wyoming, Canal Zone, Georgia, Maine, Nebraska, Puerto Rico, Utah, West Virginia, Louisiana, Montana, Alabama, Texas, Arizona (m), Canal Zone (m), Montana (m), Puerto Rico (m), Wisconsin (m), California (m)

NV: California, New York

SV: Delaware, New York, South Carolina

PAST

1965

Any 1: Arizona, Arkansas, California, Canal Zone, Florida, Kansas, Kentucky, Montana, New Mexico, New York, Puerto Rico, Washington, Georgia (j), West Virginia (j), Illinois (t), Louisiana (t), Wisconsin (t)

Any 2: Arkansas, Colorado, Idaho, Kansas, Nevada, New Mexico, Virgin Islands, Wyoming, Canal Zone (j), Massachusetts (j), Nebraska (j), Puerto Rico (j), Utah (j), Louisiana (t)

Any 3: Alaska, Arkansas, Georgia, Oregon, California (j), Louisiana (t)

NV 1: Canal Zone, Montana, Puerto Rico, California (j)

NV 2: Washington

NV 3: Nevada, New York

SV 1: Delaware

SV 2: Delaware, New York, South Carolina

V 1: Missouri

V 2: Missouri

O 1: Alabama, Texas

O 2: Ohio

PRESENT AND PAST

Any 2: Arkansas, Florida, Kansas, Kentucky, New Mexico, Wyoming, Washington, New York, Georgia (j), West Virginia, Louisiana (t), Arizona (m), Canal Zone (m), Montana (m), Puerto Rico (m), Wisconsin (m,t)

Any 3: Arkansas, Colorado, Idaho, Kansas, Nevada, New Mexico, Virgin Islands, Wyoming, Canal Zone (j), Massachusetts (j), Nebraska (j), Puerto Rico (j), Utah (j), Louisiana (t)

Any 4: Alaska, Arkansas, Georgia, Oregon, Louisiana (t)

NV 2: Canal Zone, Montana, Puerto Rico, Wisconsin (m,t), California (j,m), California

NV 3: Washington

NV 4: Nevada, New York

SV 2: Delaware

SV 3: Delaware, New York, South Carolina

V 2: Illinois (t), Missouri, California

V 3: Missouri

O 2: Alabama, Texas

O 3: Ohio

MANDATORY SENTENCE: LESS THAN LIFE

PRESENT

PAST

PRESENT AND PAST

1970

Any: Alaska, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Nevada, New Mexico, North Carolina, Virgin Islands, Washington, Wyoming, Canal Zone, Maine, Nebraska, Puerto Rico, Utah, West Virginia, Louisiana, Montana, Alabama, Texas (Arizona (m), Canal Zone (m), Montana (m), Oklahoma (m), Puerto Rico (m), Wisconsin (m), California (t)

NV: California

SV: Delaware, South Carolina

V: California, Illinois, Connecticut, Missouri

O: Ohio

Any 1: Arizona, Arkansas, California, Canal Zone, Florida, Kansas, Kentucky, Montana, New Mexico, Oklahoma, Puerto Rico, Washington, Georgia (j), West Virginia (j), Wisconsin (t), Louisiana (t), Illinois (t)

Any 2: Arkansas, Colorado, Idaho, Kansas, Nevada, New Mexico, Virgin Islands, Wyoming, Massachusetts (j), Nebraska (j), Puerto Rico (j), Utah (j), Canal Zone (j), Louisiana (t)

Any 3: Alaska, Arkansas, Georgia, North Carolina, Louisiana (t)

NV 1: Canal Zone, Montana, Puerto Rico, California (j)

NV 2: Washington

NV 3: Nevada

SV 1: Delaware

SV 2: Delaware, South Carolina

V 1: Connecticut, Illinois, Missouri

V 2: Connecticut, Missouri

O 1: Alabama, Texas

O 2: Ohio

Any 2: Arkansas, Florida, Kansas, Kentucky, New Mexico, Washington, Georgia (j), West Virginia (j), Louisiana (t), Arizona (m), Canal Zone (m), Montana (m), Oklahoma (m), Puerto Rico (m), Wisconsin (m,t)

Any 3: Arkansas, Colorado, Idaho, Kansas, Nevada, New Mexico, Virgin Islands, Nebraska (j), Massachusetts (j), Wyoming, Canal Zone (j), Puerto Rico (j), Utah (j), Louisiana (t)

Any 4: Alaska, Arkansas, Georgia, North Carolina, Louisiana (t)

NV 2: Canal Zone, Montana, Puerto Rico, California (j, m), California

NV 3: Washington

NV 4: Nevada

SV 2: Delaware

SV 3: Delaware, South Carolina

V 2: California, Illinois, Connecticut, Missouri

V 3: Connecticut, Missouri

O 2: Alabama, Texas

O 3: Ohio

MANDATORY SENTENCE: LESS THAN LIFE

PRESENT

PAST

PRESENT AND PAST

Any: Alaska, Arkansas, Colorado, Georgia, Indiana, Nevada, New Mexico, North Carolina, Virgin Islands, Washington, Wyoming, Canal Zone, Maine, Nebraska, New Hampshire, West Virginia, Montana, Louisiana, Puerto Rico, Alabama, Arizona (m), Canal Zone (m), Oklahoma (m), Wisconsin (m), California (m)

NV: New York, California, Texas

SV: South Carolina, Virgin Islands

V: California, Texas, Illinois, Montana

O: Kentucky, New York

Any 1: Arizona, Arkansas, California, Canal Zone, New Mexico, Oklahoma, Texas, Washington, Georgia (j), West Virginia (j), Montana (j,m,t), Louisiana (t), Puerto Rico (t), Wisconsin (m,t)

Any 2: Arkansas, Colorado, Idaho, Nevada, New Mexico, Virgin Islands, Wyoming, Canal Zone (j), Kentucky (j), Massachusetts (j) Nebraska (j), New Hampshire (j), Louisiana (t), Puerto Rico (t)

Any 3: Alaska, Arkansas, Georgia, North Carolina Louisiana (t)

NV 1: Canal Zone, California (j)

NV 2: Washington

NV 3: Nevada

SV 1: Virgin Islands, Virgin Islands (j,s)

SV 2: South Carolina, Virgin Islands

V 1: Illinois, Missouri

V 2: Missouri

O 1: Alabama, Puerto Rico (t), New York (m,t)

O 2: Puerto Rico (t)

1975

Any 2: Arkansas, New Mexico, Washington, Georgia (j), West Virginia (j), Montana (j,m,t), Louisiana (t), Puerto Rico (t), Arizona (m), Canal Zone (m), Oklahoma (m), Wisconsin (m,t) Wisconsin (m,t)

Any 3: Arkansas, Colorado, Idaho, Nevada, New Mexico, Virgin Islands, Wyoming, Canal Zone (j), Massachusetts (j), Nebraska (j), New Hampshire (j), Louisiana (t), Puerto Rico (t)

Any 4: Alaska, Arkansas, Georgia, North Carolina, Louisiana (t)

NV 2: Canal Zone, California (j,m), New York (m,t), California, Texas

NV 3: Washington, California (t)

NV 4: Nevada

SV 2: Virgin Islands, Virgin Islands (j,s)

SV 3: South Carolina, Virgin Islands

V 2: California, Texas, Illinois, Missouri, Illinois (t)

V 3: Missouri

O 2: Alabama, New York (m,t), Puerto Rico (t)

O 3: Puerto Rico (t), Kentucky (j)

MANDATORY SENTENCE: LESS THAN LIFE

PRESENT

Any: Georgia, Indiana, Nevada, North Carolina, Virgin Islands, Washington, Wyoming, Canal Zone, Maine, Nebraska, New Hampshire, West Virginia, Montana, California, Kentucky, New Mexico, Louisiana, Oklahoma, Puerto Rico, South Dakota, Nevada, Alabama, Canal Zone (m), Mississippi, Indiana (m), Colorado (m), Oklahoma (m), Wisconsin (m)

NV: Arkansas, Alaska, New York, Arizona, Texas

SV: Hawaii, Illinois, South Carolina, Virgin Islands

V: Alabama, Arkansas, Texas, Alaska, Illinois, Arizona, Hawaii, Maine, Missouri, New York, California, Illinois, Minnesota

O: Alabama, Arizona, Arkansas, Iowa, Kentucky, Alaska, Utah

PAST

1980

Any 1: Alabama, Arizona, Canal Zone, Texas, Washington, Georgia (j), West Virginia (j), Montana (j,m,t), California (j,t), Kentucky (j,t), New Mexico (m), Alaska (t), Arizona (t), Illinois (t), Louisiana (t), Oklahoma (t), Puerto Rico (t), South Dakota (t), Wisconsin (t)

Any 2: Arizona, Arkansas, Idaho, Iowa, Nevada, Mississippi, Virgin Islands, Wyoming, Canal Zone (j), Massachusetts (j), Nebraska (j), New Hampshire (j), Virginia (j), Kentucky (j,t), Indiana (m), New Mexico (m), Alaska (t), Colorado (t), Louisiana (t), Oklahoma (t), Puerto Rico (t)

Any 3: Arkansas, Georgia, North Carolina, New Mexico (m), Louisiana (t)

NV 1: New York (m,t), Canal Zone,

NV 2: Washington

NV 3: Nevada

SV 1: Hawaii, Canal Zone, Virgin Islands

SV 2: Hawaii, Washington, Illinois, South Carolina, Utah, Virgin Islands

PRESENT AND PAST

Any 2: Washington, Georgia (j), West Virginia (j), Montana (j,m,t), California (j,t), Kentucky (j,t), New Mexico (m), Louisiana (t), Puerto Rico (t), South Dakota (t), Canal Zone (m). Oklahoma (m,t), Wisconsin (m,t)

Any 3: Idaho, Nevada, Virgin Islands, Wyoming, Canal Zone (j), Massachusetts (j), Mississippi (j), Nebraska (j), New Hampshire (j), New Mexico (m), Louisiana (t), Oklahoma (t), Puerto Rico (t), Indiana (m), Colorado (m,t)

Any 4: Georgia, North Carolina, New Mexico (m), Louisiana (t),

NV 2: Canal Zone, Alaska (t), New York (m,t), Arizona (t), Texas

NV 3: Washington, Alaska (t), Arizona

NV 4: Nevada, Arkansas

SV 2: Hawaii, Virgin Islands, Virgin Islands (j,s)

SV 3: Illinois, South Carolina, Virgin Islands

MANDATORY SENTENCE: LESS THAN LIFE

PRESENT

PAST

PRESENT AND PAST

1980 (cont.)

V 1: Arizona, Hawaii, Missouri, Virgin Islands (j,s), New York (m,t), Alabama (t), California (t), Illinois (t), Minnesota (t)

V 2: Arizona, Maryland, Missouri

O 1: Alabama, Puerto Rico (t)

O 2: Puerto Rico (t)

V 2: Alabama, Texas, Alaska (t), Illinois (t), Arizona, Hawaii, Missouri, New York (m,t), Alabama (t), California (t), Illinois (t), Minnesota (t)

V 3: Arkansas, Arizona, Maryland, Missouri, Mississippi (j), Alaska (t)

V 4: Arkansas

O 2: Alabama, Puerto Rico (t), Arizona, Alaska (t)

O 3: Puerto Rico (t), Arizona, Arkansas, Iowa, Kentucky (j,t), Alaska (t), Utah

O 4: Arkansas

**HABITUAL OFFENDER STATUTES,
CATEGORIZED BY LENGTH OF PUNISHMENT AND TYPE OF OFFENSES: 1900-1980**

DISCRETIONARY SENTENCE: LESS THAN LIFE

PRESENT

PAST

PRESENT AND PAST

1900

Any: Pennsylvania, Connecticut, Louisiana, New York, Wisconsin, New Hampshire, Alabama, Minnesota, North Dakota (m), South Dakota (m), Oklahoma (m), California (m), Michigan (s)

NV: South Dakota, Kansas, Missouri, North Dakota, Oklahoma, Montana, Montana (m)

Any 1: South Dakota, California, Connecticut, Kansas, Louisiana, Minnesota, Missouri, Montana, New York, North Dakota, Oklahoma, Pennsylvania, Michigan (j), Wisconsin (j)

Any 2: Louisiana, New Hampshire (j)

NV 1: Montana, North Dakota

O 1: Alabama

Any 2: California (m), Connecticut, Louisiana, Minnesota, New York, North Dakota (m), Oklahoma (m), Pennsylvania, South Dakota (m), Michigan (s,j), Wisconsin (j)

Any 3: Louisiana, New Hampshire (j)

NV 2: Kansas, Missouri, Montana (m), South Dakota, North Dakota, Oklahoma, Montana

O 2: Alabama

1905

Any: District of Columbia, Minnesota, Pennsylvania, Louisiana, New York, Connecticut, Wisconsin, New Hampshire, Alabama, Arizona (m), Canal Zone (m), Puerto Rico (m), North Dakota (m), South Dakota (m), Oklahoma (m), California (m), Michigan (s)

Any 1: South Dakota, Arizona, California, Canal Zone, District of Columbia, Kansas, Louisiana, Minnesota, Missouri, Montana, New York, North Dakota, Oklahoma, Oklahoma, Pennsylvania, Puerto Rico, Connecticut (j), Michigan (j), Wisconsin (j)

Any 2: Arizona, California (m), Canal Zone (m), District of Columbia, Louisiana, Minnesota, New York, North Dakota (m), Oklahoma (m), Pennsylvania, Puerto Rico (m), South Dakota (m), Connecticut (j), Michigan (s,j), Wisconsin (j)

DISCRETIONARY SENTENCE: LESS THAN LIFE (cont.)

PRESENT

PAST

PRESENT AND PAST

NV: California, South Dakota, Kansas, Missouri, North Dakota, Oklahoma, Puerto Rico, Montana (m), Arizona (m)

Any 2: Connecticut, New Hampshire (j), Louisiana

Any 3: Connecticut, Louisiana, New Hampshire (j)

NV 1: Montana, North Dakota

NV 2: Arizona (m), California, Missouri, Montana (m), North Dakota, Oklahoma, Puerto Rico, South Dakota, Montana

O 1: Alabama

O 2: Alabama

1910

Any: District of Columbia, Louisiana, New York, Minnesota, Connecticut, Wisconsin, New Hampshire, Alabama, Arizona (m), Canal Zone (m), Puerto Rico (m), North Dakota (m), South Dakota (m), Oklahoma (m), California (m), Michigan (s)

Any 1: South Dakota, Arizona, Canal Zone, District of Columbia, Kansas, Louisiana, Minnesota, Missouri, Montana, New York, North Dakota, Oklahoma, Puerto Rico, California (j), Connecticut (j), Michigan (j), Wisconsin (j)

Any 2: Arizona (m), Canal Zone (m), District of Columbia, Louisiana, Minnesota, New York, North Dakota (m), Oklahoma (m), Puerto Rico (m), South Dakota (m), Connecticut (j), Michigan (s,j), Wisconsin (j)

NV: California, S.D., Kansas, Missouri, North Dakota, Oklahoma, Puerto Rico, Montana, Montana (m), Arizona (m)

Any 2: Connecticut, Louisiana, New Hampshire (j)

Any 3: Connecticut, Louisiana, New Hampshire (j)

NV 1: Montana, North Dakota, California (j)

NV 2: South Dakota, Arizona (m), Kansas, Missouri, Montana (m), North Dakota, Oklahoma, Puerto Rico, California (j), Montana, California (j,m)

O 1: Alabama

O 2: Alabama

DISCRETIONARY SENTENCE: LESS THAN LIFE (cont.)

PRESENT

PAST

PRESENT AND PAST

1915

Any: District of Columbia, Louisiana, New York, Minnesota, Connecticut, Wisconsin, New Hampshire, Alabama, Arizona (m), Canal Zone (m), South Dakota (m), Puerto Rico (m), North Dakota (m), Oklahoma (m) California (m), Michigan (s)

Any 1: South Dakota, Arizona, Canal Zone, District of Columbia, Kansas, Louisiana, Minnesota, Missouri, Montana, New York, North Dakota, Oklahoma, Puerto Rico, California (j), Connecticut (j), Michigan (j), Wisconsin (j)

Any 2: District of Columbia, Louisiana, Virgin Islands, Minnesota, New York, Arizona (m), Canal Zone (m), North Dakota (m), Oklahoma (m), Puerto Rico (m), South Dakota (m), Virgin Islands (m), Connecticut (j), Michigan (s,j), Wisconsin (j)

NV: California, South Dakota, Kansas, Missouri, North Dakota, Oklahoma, Puerto Rico, Montana, Montana (m), Arizona (m)

Any 2: Connecticut, Louisiana, New Hampshire (j)

Any 3: Connecticut, Louisiana, New Hampshire (j)

NV 1: Montana, North Dakota, California (j)

NV 2: South Dakota, Arizona (m), Kansas, Missouri, Montana (m), North Dakota, Oklahoma, Puerto Rico, California (j), Montana, California (j,m)

O 1: Alabama

O 2: Alabama

1920

Any: District of Columbia, Louisiana, New York, Minnesota, Connecticut, Wisconsin, New Hampshire, Rhode Island, Alabama, Arizona (m), Canal Zone (m), Puerto Rico (m), North Dakota (m), South Dakota (m), Oklahoma (m), California (m), Michigan (s), Virginia (s),

Any 1: South Dakota, Arizona, Canal Zone, District of Columbia, Kansas, Louisiana, Minnesota, Missouri, Montana, New York, North Dakota, Oklahoma, Puerto Rico, California (j), Connecticut (j), Michigan (j), Virginia (j), Wisconsin (j)

Any 2: Arizona (m), Canal Zone (m), District of Columbia, Louisiana, Minnesota, New York, North Dakota (m), Oklahoma (m), Puerto Rico (m), South Dakota (m), Connecticut (j), Michigan (s,j), Virginia (s,j), Wisconsin (j)

NV: California, South Dakota, Kansas, Missouri, North Dakota, Oklahoma, Puerto Rico, Montana, Montana (m), Arizona (m)

Any 2: Connecticut, Louisiana, New Hampshire (j), Rhode Island (j)

Any 3: Connecticut, Louisiana, New Hampshire (j), Rhode Island (j)

DISCRETIONARY SENTENCE: LESS THAN LIFE (cont.)

PRESENT

PAST

PRESENT AND PAST

1920 (cont.)

NV 1: Montana, North Dakota, California (j)

O 1: Alabama

NV 2: South Dakota, Arizona (m), Kansas, Missouri, Montana (m), North Dakota, Oklahoma, Puerto Rico, California (j), Montana, California (m,j)

O 2: Alabama

1925

Any: District of Columbia, Louisiana, New York, Minnesota, Connecticut, Wisconsin, New Hampshire, Rhode Island, Iowa, Alabama, Virgin Islands, Arizona (m), Canal Zone (m), Puerto Rico (m), Rico (m), North Dakota (m), South Dakota (m), Oklahoma (m), Virgin Islands (m), California (m), Michigan (s), Virginia (s)

NV: California, South Dakota, Kansas, Missouri, Oklahoma, Puerto Rico, Virgin Islands, Montana, North Dakota, Montana (m), Arizona (m)

O: Iowa

Any 1: South Dakota, Arizona, Canal Zone, District of Columbia, Kansas, Louisiana, Minnesota, Missouri, Montana, New York, North Dakota, Oklahoma, Puerto Rico, Virgin Islands, California (j), Connecticut (j), Michigan (j), Virginia (j), Wisconsin (j)

Any 2: Connecticut, Louisiana, Iowa (j), New Hampshire (j), Rhode Island (j)

NV 1: Montana, North Dakota, California (j)

O 1: Alabama

O 2: Iowa, Virgin Islands

Any 2: Arizona (m), Canal Zone (m), District of Columbia, Louisiana, Minnesota, New York, North Dakota (m), Oklahoma (m), Puerto Rico (m), South Dakota (m), Virgin Islands (m), Connecticut (j), Michigan (s,j), Virginia (s,j); Wisconsin (j)

Any 3: Connecticut, Louisiana, Iowa (j), New Hampshire (j), Rhode Island (j)

NV 2: South Dakota, Kansas, Arizona (m), Missouri, Montana (m), North Dakota, Oklahoma, Puerto Rico, Virgin Islands (m), California (j), Montana, California (m,j)

O 2: Alabama

O 3: Iowa, Virgin Islands

DISCRETIONARY SENTENCE: LESS THAN LIFE (cont.)

PRESENT

PAST

PRESENT AND PAST

1930

Any:	District of Columbia, Florida, Minnesota, New Mexico, Louisiana, Michigan, South Dakota, Oregon, New York, Connecticut, Wisconsin, New Hampshire, Rhode Island, Iowa, Alabama, Virgin Islands, Arizona (m), Canal Zone (m), Puerto Rico (m), Oklahoma (m), Virgin Islands (m), Michigan (m), California (m), Virginia (s)	Any 1: Arizona, Canal Zone, District of Columbia, Florida, Kansas, Louisiana, Michigan, Minnesota, Missouri, Montana, New Mexico, New York, Oklahoma, Oregon, Puerto Rico, South Dakota, Virgin Islands, California (j), Connecticut (j), Virginia (j) Wisconsin (j)	Any 2: Arizona (m), Canal Zone (m), District of Columbia, Florida, Louisiana, Michigan, Minnesota, New Mexico, New York, Oklahoma (m), Oregon, Puerto Rico (m), South Dakota, Virgin Islands (m), Connecticut (j), Virginia (s,j), Wisconsin (j)
NV:	California, Kansas, Missouri, Oklahoma, Puerto Rico, Virgin Islands, Montana, North Dakota, Montana (m), Arizona (m)	Any 2: Connecticut, Louisiana, Michigan, New Mexico, Oregon, Iowa (j), New Hampshire (j), Rhode Island (j)	Any 3: Connecticut, Louisiana, Michigan, New Mexico, Oregon, Iowa (j), New Hampshire (j), Rhode Island (j)
SV:	Pennsylvania	Any 3: Michigan	Any 4: Michigan (m)
O:	Colorado, Iowa	NV 1: Montana, California (j)	NV 2: Arizona (m), Kansas, Missouri, Montana (m), Oklahoma, Puerto Rico, California (j), Montana, California (j,m), Virgin Islands
		NV 2: North Dakota	NV 3: North Dakota
		SV 1: Pennsylvania (t)	SV 2: Pennsylvania (t)
		O 1: Alabama, Colorado	O 2: Alabama, Colorado
		O 2: Colorado, Iowa, Virgin Islands	O 3: Colorado, Iowa, Virgin Islands

DISCRETIONARY SENTENCE: LESS THAN LIFE (cont.)

PRESENT

Any: District of Columbia, Florida, Minnesota, New Mexico, Louisiana, Michigan, South Dakota, Oregon, New York, Connecticut, Wisconsin, New Hampshire, Rhode Island, Iowa, Alabama, Virgin Islands, Arizona (m), Canal Zone (m), Puerto Rico (m), Oklahoma (m), Virgin Islands (m), Michigan (m), California (m), Virginia (s)

NV: California, Kansas, Missouri, Oklahoma, Puerto Rico, Virgin Islands, Montana, North Dakota, Montana (m), Arizona (m)

SV: Pennsylvania

O: Colorado, Iowa

PAST

1935

Any 1: Arizona, California, Canal Zone, District of Columbia, Florida, Kansas, Louisiana, Michigan, Minnesota, Missouri, Montana, New Mexico, New York, Oklahoma, Oregon, Puerto Rico, South Dakota, Virgin Islands, Connecticut (j), Virginia (j), Wisconsin (j)

Any 2: Connecticut, Louisiana, Michigan, New Mexico, Oregon, Iowa (j), New Hampshire (j), Rhode Island (j)

Any 3: Michigan

NV 1: Montana, California (j)

NV 2: North Dakota

SV 1: Pennsylvania (t)

O 1: Alabama, Colorado

O 2: Colorado, Iowa, Virgin Islands

PRESENT AND PAST

Any 2: Arizona (m), Canal Zone (m), District of Columbia, Florida, Louisiana, Michigan, Minnesota, New Mexico, New York, Oklahoma (m), Oregon, Puerto Rico (m), South Dakota, Virgin Islands (m), Connecticut (j), Virginia (s,j), Wisconsin (j)

Any 3: Connecticut, Louisiana, Michigan, New Mexico, Oregon, Iowa (j), New Hampshire (j), Rhode Island (j)

Any 4: Michigan (m)

NV 2: Arizona (m), California, Kansas, Missouri, Montana (m), Oklahoma, Montana, California (j,m), Puerto Rico, Virgin Islands

NV 3: North Dakota

SV 2: Pennsylvania (t)

O 2: Alabama, Colorado

O 3: Colorado, Iowa, Virgin Islands

DISCRETIONARY SENTENCE: LESS THAN LIFE (cont.)

PRESENT

Any: Alaska, District of Columbia, Florida, Minnesota, New Mexico, Louisiana, Michigan, South Dakota, Oregon, New York, Wyoming, Connecticut, Wisconsin, New Hampshire, Rhode Island, Iowa, Nebraska, Alabama, Virgin Islands, Arizona (m), Canal Zone (m), Puerto Rico (m), Oklahoma (m), Virgin Islands (m), Michigan (m), California (m), Virginia (s)

NV: California, Alaska, Missouri, Oklahoma, Puerto Rico, Virgin Islands, Montana, North Dakota, Montana (m), Arizona (m)

SV: Pennsylvania

O: Colorado, Iowa

PAST

1940

Any 1: Alaska, Arizona, Canal Zone, District of Columbia, Florida, Louisiana, Michigan, Minnesota, Missouri, Montana, New Mexico, New York, Oklahoma, Oregon, Puerto Rico, South Dakota, Virgin Islands, California (j), Connecticut (j), Virginia (j), Wisconsin (j)

Any 2: Alaska, Connecticut, Louisiana, Michigan, New Mexico, Oregon, Wyoming, Iowa (j), Nebraska (j), New Hampshire (j), Rhode Island (j)

Any 3: Michigan

NV 1: Montana, California (j)

NV 2: North Dakota

NV 3: Alaska

SV 1: Pennsylvania (t)

O 1: Alabama, Colorado

O 2: Colorado, Iowa, Virgin Islands

PRESENT AND PAST

Any 2: Alaska, Arizona (m), Canal Zone (m), District of Columbia, Florida, Louisiana, Michigan, Minnesota, New Mexico, New York, Oklahoma (m), Oregon, Puerto Rico (m), South Dakota, Virgin Islands (m), Connecticut (j), Virginia (j,s), Wisconsin (j)

Any 3: Connecticut, Louisiana, Michigan, Oregon, New Mexico, Wyoming, Iowa (j), Nebraska (j), New Hampshire (j), Rhode Island (j), Alaska

Any 4: Michigan (m)

NV 2: Arizona (m), Missouri, Montana (m) Oklahoma, Puerto Rico, Virgin Islands, California (j), Montana, California (m,j)

NV 3: North Dakota

NV 4: Alaska

SV 2: Pennsylvania (t)

O 2: Alabama, Colorado

O 3: Colorado, Iowa, Virgin Islands

DISCRETIONARY SENTENCE: LESS THAN LIFE (cont.)

PRESENT

Any: Alaska, District of Columbia, Florida, Minnesota, New Mexico, Michigan, South Dakota, Oregon, New Jersey, Wyoming, Connecticut, Wisconsin, New Hampshire, Rhode Island, Iowa, Nebraska, Louisiana, Alabama, Virgin Islands, Arizona (m), Canal Zone (m), Puerto Rico (m), Oklahoma (m), New York (m), Virgin Islands (m), Michigan (m), California (m), Virginia (s)

NV: California, Alaska, Missouri, Oklahoma, Puerto Rico, Virgin Islands, Montana, North Dakota, Montana (m), Arizona (m)

SV: Pennsylvania

O: Colorado, Iowa

PAST

1945

Any 1: Alaska, Arizona, Canal Zone, District of Columbia, Florida, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, Oklahoma, Oregon, Puerto Rico, South Dakota, Virgin Islands, California (j), Connecticut (j), Virginia (j), Wisconsin (j), Louisiana (t)

Any 2: Alaska, Connecticut, Michigan, New Jersey, New Mexico, Oregon, Wyoming, Iowa (j), Nebraska (j), New Hampshire (j), Rhode Island (j), Louisiana (t)

Any 3: Michigan

NV 1: Montana, Colorado (j)

NV 2: North Dakota

NV 3: Alaska

SV 1: Pennsylvania (t)

O 1: Alabama, Colorado

O 2: Colorado, Iowa, Virgin Islands

PRESENT AND PAST

Any 2: Alaska, Arizona (m), Canal Zone (m), District of Columbia, Florida, Michigan, Minnesota, New Jersey, New Mexico, New York (m), Oklahoma (m), Oregon, Puerto Rico (m), South Dakota, Virgin Islands (m), Connecticut (j), Virginia (s,j), Wisconsin (j), Louisiana (t)

Any 3: Alaska, Connecticut, Michigan, New Jersey, New Mexico, Oregon, Wyoming, Iowa (j), Nebraska (j), New Hampshire (j), Rhode Island (j), Louisiana (t)

Any 4: Michigan (m)

NV 2: Arizona (m), Virgin Islands, Missouri, Montana (m), Oklahoma, Puerto Rico, California (j), Montana, California (m,j)

NV 3: North Dakota

NV 4: Alaska

NV 2: Pennsylvania (t)

O 2: Alabama, Colorado

O 3: Colorado, Iowa, Virgin Islands

DISCRETIONARY SENTENCE: LESS THAN LIFE (cont.)

PRESENT

Any: Alaska, District of Columbia, Florida, Minnesota, New Mexico, Michigan, South Dakota, New Jersey, Wyoming, Colorado, Connecticut, Wisconsin, New Hampshire, Rhode Island, Iowa, Nebraska, Louisiana, Oregon, Alabama, Virgin Islands, Arizona (m), Canal Zone (m), Puerto Rico (m), Oklahoma (m), New York (m), Virgin Islands (m), Michigan (m), California (m), Virginia (s)

NV: California, Alaska, Missouri, Oklahoma, Puerto Rico, Virgin Islands, Montana, North Dakota, Montana (m), Arizona (m)

SV: Pennsylvania

O: Iowa

PAST

1950

Any 1: Alaska, Arizona, Canal Zone, District of Columbia, Florida, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, Oklahoma, Puerto Rico, South Dakota, Virgin Islands, California (j), Connecticut (j), Virginia (j), Wisconsin (j), Louisiana (t), Oregon (t)

Any 2: Alaska, Colorado, Connecticut, Michigan, New Jersey, New Mexico, Wyoming, Iowa (j), Nebraska (j), New Hampshire (j), Rhode Island (j), Louisiana (t)

Any 3: Michigan

NV 1: Montana, California (j)

NV 2: North Dakota

NV 3: Alaska

SV 1: Pennsylvania (t)

O 1: Alabama

O 2: Iowa, Virgin Islands

PRESENT AND PAST

Any 2: Alaska, Arizona (m), Canal Zone (m), District of Columbia, Florida, Michigan, Minnesota, New Jersey, New Mexico, New York (m), South Dakota, Oklahoma (m), Puerto Rico (m), Virgin Islands (m), Connecticut (j), Virginia (s,j), Wisconsin (j), Louisiana (t), Oregon (t)

Any 3: Alaska, Colorado, Connecticut, Michigan, New Jersey, New Mexico, Wyoming, Iowa (j), Nebraska (j), New Hampshire (j), Rhode Island (j), Louisiana (t)

Any 4: Michigan (m)

NV 2: Arizona (m), Missouri, Montana (m), Oklahoma, Puerto Rico, Virgin Islands, California (j), California (j,m)

NV 3: North Dakota

NV 4: Alaska

SV 2: Pennsylvania (t)

O 2: Alabama

O 3: Iowa, Virgin Islands

DISCRETIONARY SENTENCE: LESS THAN LIFE (cont.)

PRESENT

Any: Alaska, District of Columbia, Florida, Minnesota, New Mexico, New Jersey, Michigan, South Dakota, New York, Wyoming, Colorado, Connecticut, New Hampshire, Rhode Island, Iowa, Nebraska, Louisiana, Wisconsin, Oregon, Alabama, Virgin Islands, Canal Zone (m), Puerto Rico (m), Oklahoma (m), Arizona (m), Virgin Islands (m), Michigan (m), California (m), Virginia (s)

NV: California, Alaska, Missouri, Oklahoma, Puerto Rico, Virgin Islands, Montana, North Dakota, Arizona (m), Montana (m)

SV: Delaware, Pennsylvania

O: Iowa

PAST

1955

Any 1: Alaska, Arizona, Canal Zone, District of Columbia, Florida, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, Oklahoma, Puerto Rico, South Dakota, Virgin Islands, California (j), Connecticut (j), Virginia (j), Louisiana (t), Oregon (t), Wisconsin (t)

Any 2: Alaska, Colorado, Connecticut, Michigan, New Jersey, New Mexico, Wyoming, Iowa (j), Nebraska (j), New Hampshire (j), Rhode Island (j), Louisiana (t)

Any 3: Michigan

NV 1: Montana, California (j)

NV 2: North Dakota

NV 3: Alaska, Wisconsin (t)

SV 1: Delaware, Pennsylvania (t)

SV 2: Delaware

O 1: Alabama

O 2: Iowa, Virgin Islands

PRESENT AND PAST

Any 2: Alaska, Arizona (m), Canal Zone (m), District of Columbia, Florida, Michigan, Minnesota, New Jersey, New Mexico, New York, Oklahoma (m), Puerto Rico (m), South Dakota, Virgin Islands (m), Connecticut (j), Virginia (s,j), Louisiana (t), Oregon (t), Wisconsin (t)

Any 3: Alaska, Colorado, Connecticut, Michigan, New Jersey, New Mexico, Wyoming, Iowa (j), Nebraska (j), New Hampshire (j), Rhode Island (j), Louisiana (t)

Any 4: Michigan (m)

NV 2: Arizona (m), Missouri, Montana (m), Oklahoma, Puerto Rico, Virgin Islands, California (j), Montana, California (m,j)

NV 3: North Dakota

NV 4: Alaska, Wisconsin (t)

SV 2: Delaware, Pennsylvania (t)

SV 3: Delaware

O 2: Alabama

O 3: Virgin Islands, Iowa

DISCRETIONARY SENTENCE: LESS THAN LIFE (cont.)

PRESENT

Any: Alaska, District of Columbia, Florida, Minnesota, New Mexico, New Jersey, Michigan, South Dakota, New York, Wyoming, Colorado, Connecticut, New Hampshire, Rhode Island, Iowa, Nebraska, Louisiana, Oregon, Wisconsin, Alabama, Canal Zone (m), Puerto Rico (m), Oklahoma (m), Arizona (m), Michigan (m), Wisconsin (m), California (m), Virginia (s)

NV: California, Alaska, Oklahoma, Puerto Rico, Montana, North Dakota, Arizona (m), Montana (m)

SV: Delaware, Pennsylvania

O: Iowa

PAST

1960

Any 1: Alaska, Arizona, Canal Zone, District of Columbia, Florida, Michigan, Minnesota, Montana, New Jersey, New Mexico, New York, Oklahoma, Puerto Rico, South Dakota, California (j), Connecticut (j), Virginia (j), Louisiana (t), Oregon (t), Wisconsin (t)

Any 2: Alaska, Colorado, Connecticut, Michigan, New Jersey, New Mexico, Wyoming, Iowa (j), Nebraska (j), New Hampshire (j), Rhode Island (j), Louisiana (t)

Any 3: Michigan

NV 1: Montana, California (j)

NV 2: North Dakota

NV 3: Alaska, Wisconsin (t)

SV 1: Delaware, Pennsylvania (t)

SV 2: Delaware

O 1: Alabama

O 2: Iowa

PRESENT AND PAST

Any 2: Alaska, Arizona (m), Canal Zone (m), District of Columbia, Florida, Michigan, Minnesota, New Jersey, New Mexico, New York, Oklahoma (m), Puerto Rico (m), South Dakota, Connecticut (j), Virginia (s,j), Louisiana (t), Oregon (t), Wisconsin (m,t)

Any 3: Alaska, Colorado, Connecticut, Michigan, New Jersey, New Mexico, Wyoming, Iowa (j), Nebraska (j), New Hampshire (j), Rhode Island (j), Louisiana (t)

Any 4: Michigan (m)

NV 2: Arizona (m), Montana (m), Oklahoma, Puerto Rico, California (j), Montana, California (m,j)

NV 3: North Dakota

NV 4: Alaska, Wisconsin (t)

SV 2: Delaware, Pennsylvania (t)

SV 3: Delaware

O 2: Alabama

O 3: Iowa

DISCRETIONARY SENTENCE: LESS THAN LIFE (cont.)

PRESENT

Any: Alaska, District of Columbia, Florida, New Mexico, New Jersey, Michigan, South Dakota, Oregon, New York, Wyoming, Colorado, Connecticut, New Hampshire, Rhode Island, Iowa, Nebraska, Minnesota, Louisiana, Wisconsin, Alabama, Canal Zone (m), Puerto Rico (m), Oklahoma (m), Arizona (m), Michigan (m), Wisconsin (m), California (m), Virginia (s)

NV: California, Alaska, Oklahoma, Puerto Rico, Montana, North Dakota, Arizona (m), Montana (m)

SV: Delaware, Pennsylvania

V: Illinois

O: Iowa

PAST

1965

Any 1: Alaska, Arizona, Canal Zone, District of Columbia, Florida, Michigan, Montana, New Jersey, New Mexico, New York, Oklahoma, Oregon, Puerto Rico, South Dakota, California (j), Connecticut (j), Virginia (j), Illinois (t), Louisiana (t), Minnesota (t), Wisconsin (t)

Any 2: Alaska, Colorado, Connecticut, Michigan, New Jersey, New Mexico, Oregon, Wyoming, Iowa (j), Nebraska (j), New Hampshire (j), Rhode Island (j), Louisiana (t)

Any 3: Michigan

NV 1: Montana, California (j)

NV 2: North Dakota

NV 3: Alaska, Wisconsin (t)

SV 1: Delaware, Pennsylvania (t)

SV 2: Delaware

O 1: Alabama

O 2: Iowa

PRESENT AND PAST

Any 2: Alaska, Arizona (m), Canal Zone (m), District of Columbia, Florida, Michigan, New Jersey, New Mexico, New York, Oklahoma (m), Oregon, Puerto Rico (m), South Dakota, Connecticut (j), Virginia (j,s), Minnesota (t), Louisiana (t), Wisconsin (m,t)

Any 3: Alaska, Colorado, Connecticut, Michigan, New Jersey, New Mexico, Oregon, Wyoming, Iowa (j), Nebraska (j), New Hampshire (j), Rhode Island (j), Louisiana (t)

Any 4: Michigan (m)

NV 2: Arizona (m), Montana (m), Oklahoma, Puerto Rico, California (j), Montana California (m,j)

NV 3: North Dakota

NV 4: Alaska, Wisconsin (t)

SV 2: Delaware, Pennsylvania (t)

SV 3: Delaware

V 2: Illinois (t)

O 2: Alabama

O 3: Iowa

DISCRETIONARY SENTENCE: LESS THAN LIFE (cont.)

PRESENT

PAST

PRESENT AND PAST

Any: Alaska, Arkansas, District of Columbia, Florida, New Mexico, New Jersey, Michigan, South Dakota, Oregon, Wyoming, Minnesota, Louisiana, Wisconsin, Alabama, Canal Zone (m), Puerto Rico (m), Oklahoma (m), Arizona (m), Wisconsin (m), California (m), Colorado, New Hampshire, Rhode Island, Iowa, Michigan (m)

NV: California, Alaska, Oklahoma, Puerto Rico, Montana, North Dakota, Arizona (m), Montana (m)

SV: Delaware, Pennsylvania

V: Illinois, Connecticut, Oregon

O: Iowa

Any 1: Alaska, Arizona, Arkansas, Canal Zone, District of Columbia, Florida, Michigan, Montana, New Jersey, New Mexico, Oklahoma, Oregon, Puerto Rico, South Dakota, California (j), Illinois (t), Louisiana (t), Minnesota (t), Wisconsin (t)

Any 2: Alaska, Arkansas, Colorado, Michigan, New Jersey, New Mexico, Oregon, Wyoming, Iowa (j), New Hampshire (j), Rhode Island (j), Louisiana (t)

Any 3: Arkansas, Michigan

NV 1: Montana, California (j)

NV 2: North Dakota

NV 3: Alaska, Wisconsin (t)

SV 1: Delaware, Pennsylvania (t)

SV 2: Delaware

V 1: Connecticut, Oregon

V 2: Oregon

O 1: Alabama

O 2: Iowa

1970

Any 2: Alaska, Arizona (m), Arkansas, Canal Zone (m), District of Columbia, Florida, Michigan, New Jersey, New Mexico, Oklahoma (m), Oregon, Puerto Rico (m), South Dakota, Louisiana (t), Minnesota (t), Wisconsin (m,t)

Any 3: Alaska, Arkansas, Colorado, Michigan, New Jersey, New Mexico, Oregon, Wyoming, Louisiana (t), New Hampshire (j), Rhode Island (j), Iowa (j)

Any 4: Arkansas, Michigan (m)

NV 2: Arizona (m), Montana (m), Oklahoma, Puerto Rico, California (j), Montana, California (m,j)

NV 3: North Dakota

NV 4: Alaska, Wisconsin (t)

SV 2: Delaware, Pennsylvania (t)

SV 3: Delaware

V 2: Illinois (t), Connecticut, Oregon

V 3: Oregon

O 2: Alabama

O 3: Iowa

DISCRETIONARY SENTENCE: LESS THAN LIFE (cont.)

PRESENT

Any: Alaska, Arkansas, District of Columbia, Florida, New Mexico, New Jersey, Michigan, South Dakota, Oregon, Wyoming, Minnesota, Louisiana, Wisconsin, Alabama, Canal Zone (m), Puerto Rico (m), Oklahoma (m), Arizona (m), Wisconsin (m), California (m), Colorado, New Hampshire, Rhode Island, Iowa, Michigan (m)

NV: California, Alaska, Oklahoma, Puerto Rico, Montana, North Dakota, Arizona (m), Montana (m)

SV: Delaware, Pennsylvania

V: Illinois, Connecticut, Oregon

O: Iowa

PAST

1970

Any 1: Alaska, Arizona, Arkansas, Canal Zone, District of Columbia, Florida, Michigan, Montana, New Jersey, New Mexico, Oklahoma, Oregon, Puerto Rico, South Dakota, California (j), Illinois (t), Louisiana (t), Minnesota (t), Wisconsin (t)

Any 2: Alaska, Arkansas, Colorado, Michigan, New Jersey, New Mexico, Oregon, Wyoming, Iowa (j), New Hampshire (j), Rhode Island (j), Louisiana (t)

Any 3: Arkansas, Michigan

NV 1: Montana, California (j)

NV 2: North Dakota

NV 3: Alaska, Wisconsin (t)

SV 1: Delaware, Pennsylvania (t)

SV 2: Delaware

V 1: Connecticut, Oregon

V 2: Oregon

O 1: Alabama

O 2: Iowa

PRESENT AND PAST

Any 2: Alaska, Arizona (m), Arkansas, Canal Zone (m), District of Columbia, Florida, Michigan, New Jersey, New Mexico Oklahoma (m), Oregon, Puerto Rico (m), South Dakota, Louisiana (t), Minnesota (t), Wisconsin (m,t)

Any 3: Alaska, Arkansas, Colorado, Michigan, New Jersey, New Mexico, Oregon, Wyoming, Louisiana (t), New Hampshire (j), Rhode Island (j), Iowa (j)

Any 4: Arkansas, Michigan (m)

NV 2: Arizona (m), Montana (m), Oklahoma, Puerto Rico, California (j), Montana, California (m,j)

NV 3: North Dakota

NV 4: Alaska, Wisconsin (t)

SV 2: Delaware, Pennsylvania (t)

SV 3: Delaware

V 2: Illinois (t), Connecticut, Oregon

V 3: Oregon

O 2: Alabama

O 3: Iowa

DISCRETIONARY SENTENCE: LESS THAN LIFE (cont.)

PRESENT

Any: Alaska, Arkansas, District of Columbia, Kansas, New Mexico, New Jersey, South Dakota, Michigan, Wyoming, New Mexico, Colorado, Nevada, New Hampshire, Rhode Island, Iowa, United States, Minnesota Louisiana, Puerto Rico, Wisconsin, Alabama, Canal Zone (m), Oklahoma (m), Arizona (m), Michigan (m), Wisconsin, California (m)

NV: California, Connecticut, New York, Alaska, Oklahoma, North Dakota, Arizona (m)

SV: Michigan, Pennsylvania, Virgin Islands

V: Illinois, Oregon

O: Hawaii, Kentucky, Connecticut, New York, Florida, Iowa

PAST

1975

Any 1: Alaska, Arizona, Arkansas, Canal Zone, District of Columbia, Kansas, Michigan, New Jersey, New Mexico, Oklahoma, South Dakota, California (j), New York (m,t), Florida (t), Illinois (t), Louisiana (t), Minnesota (t), Oregon (t) Puerto Rico (t), Wisconsin (t)

Any 2: Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Michigan, Nevada, New Jersey, New Mexico, Wyoming, Connecticut (j), Iowa (j), Kentucky (j), New Hampshire (j), Rhode Island (j), United States (j,m,t), Louisiana (t), Puerto Rico (t)

Any 3: Arkansas, Michigan

NV 1: California (j)

NV 2: North Dakota

NV 3: Nevada, Alaska, Wisconsin (t)

SV 1: Michigan, Virgin Islands, Pennsylvania (t)

V 1: Oregon, Virgin Islands (j,s)

V 2: Oregon

PRESENT AND PAST

Any 2: Alaska, Arizona (m), Arkansas, Canal Zone (m), District of Columbia, Kansas, Michigan, New Jersey, New Mexico, Oklahoma (m), South Dakota, Louisiana (t), Minnesota (t), Puerto Rico (t), Wisconsin (m,t)

Any 3: Alaska, Arkansas, Colorado, District of Columbia, Michigan, Nevada, New Jersey, New Mexico, Wyoming, Iowa (j), United States (j,m,t), Louisiana (t), Puerto Rico (t), New Hampshire (j), Rhode Island (j)

Any 4: Arkansas, Michigan (m)

NV 2: Arizona (m), Oklahoma, California (j), Connecticut (j), New York (m,t), California (j,m)

NV 3: North Dakota, Connecticut (j)

NV 4: Nevada, Alaska, Wisconsin (t)

SV 2: Michigan, Virgin Islands, Pennsylvania (t), Virgin Islands (j,s)

V 2: Illinois (t), Oregon (t), Oregon

V 3: Oregon

DISCRETIONARY SENTENCE: LESS THAN LIFE (cont.)

PRESENT

Any: District of Columbia, Kansas, Michigan, Wyoming, Nevada, New Hampshire, Rhode Island, Minnesota, United States, Louisiana, Wisconsin, Alabama, Canal Zone (m), Michigan (m), Wisconsin (m), Oklahoma (m), Colorado (m)

NV: Arkansas, Connecticut, Alaska, New York, Missouri, Arizona, Oklahoma,

SV: Michigan, Virgin Islands, Illinois

V: Illinois, Alaska, Oregon, Arizona, New York, Alabama

O: Alabama, Arizona, Arkansas, Iowa, Hawaii, Missouri, Connecticut, Kentucky, Florida, Alaska, North Dakota

PAST

1975 (cont.)

O 1: Alabama, Puerto Rico (t)

O 2: Iowa, Puerto Rico (t)

1980

Any 1: Alabama, Arizona, Canal Zone, District of Columbia, Kansas, Michigan, Alaska (t), Arizona (t), Florida (t), Illinois (t), Louisiana (t), Minnesota (t), Oklahoma (t), Oregon (t), Wisconsin (t)

Any 2: Arizona, Arkansas, District of Columbia, Hawaii, Iowa, Kansas, Michigan, Missouri, Nevada, Wyoming, Connecticut (j), New Hampshire (j), Rhode Island (j), United States (j,m,t), Kentucky (j,t), Florida (m,t), Alaska (t), Colorado (t), Louisiana (t)

Any 3: Arkansas, Michigan

NV 1: New York (m,t)

NV 2: Iowa (j)

PRESENT AND PAST

O 2: New York (m,t), Florida (t), Alabama, Puerto Rico (t)

O 3: Hawaii, Connecticut (j), Kentucky (j), Iowa, Puerto Rico (t)

Any 2: Canal Zone (m), District of Columbia, Kansas, Michigan, Louisiana (t), Oklahoma (m,t), Wisconsin (m,t)

Any 3: District of Columbia, Kansas, Michigan, Nevada, Wyoming, New Hampshire (j), Rhode Island (j), United States (j,m,t), Colorado (m,t), Louisiana (t)

Any 4: Michigan (m), Minnesota (t)

NV 2: Arizona (t), Alaska (t), Oklahoma (t) New York (m,t), Missouri

NV 3: Arizona, Arkansas, Connecticut (j), Alaska (t)

DISCRETIONARY SENTENCE: LESS THAN LIFE (cont.)

PRESENT

PAST

1980 (cont.)

NV 3: Nevada, North Dakota, Wisconsin (t)

SV 1: Michigan, Missouri, Virgin Islands,

SV 2: Illinois

V 1: Arizona, Oregon, Virgin Islands (j,s),
New York (m,t), Alabama (t), Illinois (t)

V 2: Arizona, Oregon

O 1: Alabama

O 2: North Dakota

PRESENT AND PAST

NV 4: Arkansas, Nevada, Wisconsin (t)

SV 2: Michigan, Missouri, Virgin Islands,
Virgin Islands (j,s)

SV 3: Illinois

V 2: Alaska (t), Illinois (t), Oregon (t),
Arizona, Oregon, New York (m,t),
Alabama (t)

V 3: Alaska (t), Arizona, Oregon

O 2: Alabama, Arizona, Alaska (t), Florida
(t), Missouri

O 3: Arizona, Arkansas, Hawaii, Iowa,
Missouri, Connecticut (j), Kentucky
(j,t), Florida (m,t), Alaska (t),
Iowa (j), North Dakota

O 4: Arkansas, North Dakota

STATES WITH NO HABITUAL OFFENDER STATUTE: 1900-1980

1900

Alaska	Arizona	Arkansas	Canal Zone
Colorado	Delaware	District of Columbia	Florida
Hawaii	Idaho	Indiana	Maryland
Nebraska	Nevada	New Jersey	New Mexico
North Carolina	Oregon	Puerto Rico	South Carolina
Tennessee	United States	Vermont	Virgin Islands
Washington	Wyoming	Mississippi	

1905

Alaska	Arkansas	Colorado	Delaware
Florida	Hawaii	Idaho	Indiana
Maryland	Nebraska	Nevada	New Jersey
New Mexico	North Carolina	Oregon	South Carolina
Tennessee	United States	Vermont	Virgin Islands
Wyoming	Mississippi		

1910

Alaska	Arkansas	Colorado	Delaware
Florida	Hawaii	Idaho	Maryland
Nebraska	Nevada	New Jersey	New Mexico
North Carolina	Oregon	South Carolina	Tennessee
United States	Vermont	Virgin Islands	Wyoming
Mississippi			

1915

Alaska	Arkansas	Colorado	Delaware
Florida	Hawaii	Idaho	Maryland
Nebraska	New Jersey	New Mexico	North Carolina
Oregon	South Carolina	Tennessee	United States
Vermont	Virgin Islands	Wyoming	Mississippi

1920

Alaska	Arkansas	Colorado	Delaware
Florida	Hawaii	Idaho	Maryland
Nebraska	New Jersey	New Mexico	North Carolina
Oregon	South Carolina	Tennessee	United States
Vermont	Virgin Islands	Wyoming	Mississippi

1925

Alaska	Arkansas	Colorado	Delaware
Florida	Hawaii	Maryland	New Jersey
New Mexico	North Carolina	South Carolina	Tennessee
United States	Vermont	Wyoming	Mississippi

1930

Alaska	Arkansas	Delaware	Hawaii
Maryland	North Carolina	South Carolina	Tennessee
United States	Wyoming	Mississippi	

1935

Alaska	Arkansas	Delaware	Hawaii
Maryland	North Carolina	South Carolina	Tennessee
United States	Wyoming	Mississippi	

STATES WITH NO HABITUAL OFFENDER STATUTE: 1900-1980 (cont.)

1940

Arkansas
North Carolina

Delaware
South Carolina

Hawaii
United States

Maryland
Mississippi

1945

Arkansas
North Carolina

Delaware
South Carolina

Hawaii
United States

Mayland
Mississippi

1950

Arkansas
North Carolina

Delaware
South Carolina

Hawaii
United States

Maryland
Mississippi

1955

Hawaii
United States

Maryland
Mississippi

North Carolina
South Carolina

1960

Hawaii
Mississippi

Maryland
North Carolina

United States

Hawaii
Mississippi

1965

North Carolina
United States

1970

Hawaii
Maryland

United States

Mississippi

Maryland
Mississippi

1975

Ohio

Utah

1980

Maine
Virginia

New Jersey
Ohio

Pennsylvania

NUMBER OF JURISDICTIONS IN THE U.S. WITH HABITUAL
OFFENDER STATUTES, BY LENGTH OF PUNISHMENT AND
TYPE OF UNDERLYING OFFENSES
1900 - 1980

MANDATORY LIFE SENTENCE

Type of Felonies Triggering Application of the Statutes

	Any Felonies (No. of felonies)				At least one violent felony (No. of felonies)				Other limitations (No. of felonies)			
	2	3	4+	Total	2	3	4+	Total	2	3	4+	Total
1900	-	5	-	5	-	-	-	0	-	-	-	0
1905	-	6	-	6	-	-	-	0	-	-	-	0
1910	-	7	2	8	-	-	-	0	-	-	-	0
1915	-	7	3	9	-	-	-	0	-	-	-	0
1920	-	6	2	7	-	-	-	0	-	-	-	0
1925	-	7	3	9	-	-	1	1	-	-	-	0
1930	-	7	9	15	-	-	1	1	-	-	2	2
1935	-	6	9	13	-	-	1	1	-	-	3	3
1940	-	5	10	14	-	-	2	2	-	1	1	1
1945	-	5	10	14	-	-	2	2	-	1	3	3
1950	-	6	10	13	-	-	2	2	-	-	1	1
1955	-	5	8	12	-	1	2	3	-	-	1	1
1960	-	6	8	12	-	-	3	3	-	-	1	1
1965	-	6	7	11	-	-	3	3	-	-	1	1
1970	-	6	7	11	-	-	3	3	-	-	1	1
1975	-	5	6	9	-	2	3	5	-	-	-	0
1980	-	3	5	7	-	5	4	8	-	-	-	0

Column # 1 2 3 4 5 6 7 8 9 10 11 12

DISCRETIONARY LIFE SENTENCE

Type of Felonies Triggering Application of the Statutes

	Any or Non-violent felonies (No. of felonies)				At least one violent or semi-violent felony (No. of felonies)				Other Limitations (No. of felonies)			
	2	3	4+	Total	2	3	4+	Total	2	3	4+	Total
1900	6	3	1	10	-	-	-	-	-	1	-	1
1905	10	3	1	14	-	-	-	-	-	-	-	0
1910	10	4	1	14	-	-	-	-	-	-	-	0
1915	10	5	2	15	-	-	-	-	-	-	-	0
1920	10	6	2	16	-	-	-	-	-	-	-	0
1925	12	8	2	20	-	1	1	-	-	-	-	0
1930	10	7	5	20	-	1	1	-	-	-	-	0
1935	9	7	5	18	-	1	1	-	-	-	-	0
1940	9	7	6	19	-	1	1	-	-	-	-	0
1945	9	7	6	19	-	1	1	-	-	-	-	0
1950	9	7	9	22	-	-	1	1	-	-	-	0
1955	10	8	9	23	1	1	1	3	-	-	-	0
1960	9	9	12	25	1	1	1	3	-	-	-	0
1965	9	8	12	24	-	1	1	2	-	-	-	0
1970	9	8	11	25	3	1	2	4	-	-	-	0
1975	6	7	9	21	3	3	2	8	-	2	-	2
1980	6	8	7	18	6	9	2	12	1	5	-	5

Column # 1 2 3 4 5 6 7 8 9 10 11 12

MANDATORY SENTENCE:
LESS THAN LIFE

Type of Felonies Triggering Application of the Statutes

Any or Non-violent felonies (No. of felonies)	At least one violent or semi-violent felony						Other Limitations					
	2 3 4+ Total			2 3 4+ Total			2 3 4+ Total					
	2	3	4+	Total	2	3	4+	Total	2	3	4+	Total
1900	14	5	-	19	-	-	-	0	2	1	-	3
1905	18	8	-	23	-	-	-	0	2	1	-	3
1910	18	13	-	24	-	-	-	0	-	2	-	2
1915	18	12	-	26	-	-	-	0	2	1	-	3
1920	17	11	1	24	-	-	-	0	2	1	-	3
1925	18	12	1	26	-	1	-	1	2	-	-	2
1930	22	14	3	27	1	1	-	1	3	1	1	4
1935	23	15	4	29	1	1	-	1	3	2	-	4
1940	21	17	5	30	2	1	-	2	3	2	-	4
1945	21	16	7	29	2	1	-	2	3	2	-	4
1950	19	14	6	28	2	1	-	2	2	1	-	3
1955	20	16	8	29	3	3	-	4	2	1	-	3
1960	19	16	8	29	3	4	-	5	2	1	-	3
1965	17	15	7	26	4	4	-	6	2	-	-	2
1970	16	13	6	24	5	4	-	4	2	1	-	3
1975	15	15	6	25	5	3	-	5	3	2	-	4
1980	16	17	6	28	11	9	2	14	4	6	1	8

Column # 1 2 3 4 5 6 7 8 9 10 11 12

DISCRETIONARY SENTENCE:
LESS THAN LIFE

Type of Felonies Triggering Application of the Statutes

Any or Non-violent felonies (No. of felonies)	At least one violent or semi-violent felony						Other Limitations					
	2 3 4+ Total			2 3 4+ Total			2 3 4+ Total					
	2	3	4+	Total	2	3	4+	Total	2	3	4+	Total
1900	14	2	-	15	-	-	-	0	1	-	-	1
1905	17	3	-	18	-	-	-	0	1	-	-	1
1910	17	3	-	17	-	-	-	0	1	-	-	1
1915	18	3	-	19	-	-	-	0	1	-	-	1
1920	18	4	-	20	-	-	-	0	1	-	-	1
1925	19	5	-	22	-	-	-	0	1	2	-	3
1930	21	9	1	25	1	-	-	1	2	3	-	4
1935	21	9	1	25	1	-	-	1	2	3	-	4
1940	21	12	2	27	1	-	-	1	2	3	-	4
1945	25	13	2	28	1	-	-	1	2	3	-	4
1950	22	13	2	29	1	-	-	1	1	2	-	3
1955	22	13	2	29	2	1	-	2	1	2	-	3
1960	20	13	3	27	2	1	-	2	1	1	-	2
1965	20	14	3	27	3	1	-	2	1	1	-	2
1970	18	13	4	24	5	2	-	5	1	1	-	2
1975	19	16	5	26	5	1	-	5	4	5	-	8
1980	11	15	4	20	3	1	-	4	-	-	-	0

Column # 1 2 3 4 5 6 7 8 9 10 11 12

NUMBER OF JURISDICTIONS WITH
HABITUAL OFFENDER STATUTES, BY NATURE
OF PUNISHMENT: 1900-1980

SUMMARY OF TABLES 7A-D

Year	Life, <u>Mandatory</u>			Life, <u>Discretionary</u>			Less than Life, <u>Mandatory</u>	Less than Life, <u>Discretionary</u>	No <u>Statute</u>
	Any	Violent	Other	Total	Total	Total			
1900	5	-	-	5	11	22	16	27	
1905	6	-	-	6	14	26	19	22	
1910	8	-	-	8	14	27	19	21	
1915	9	-	-	9	15	28	19	20	
1920	7	-	-	7	16	23	21	20	
1925	9	1	-	10	20	28	23	16	
1930	15	1	2	18	21	33	28	11	
1935	13	1	3	17	21	33	28	11	
1940	14	2	1	17	20	34	28	8	
1945	14	2	3	19	21	33	31	8	
1950	13	2	1	16	23	30	31	9	
1955	12	3	1	15	26	33	32	6	
1960	12	3	1	16	26	35	30	5	
1965	11	3	1	15	24	33	31	5	
1970	11	3	1	15	28	34	27	4	
1975	9	5	-	14	30	30	32	4	
1980	7	8	-	15	29	37	29	5	

Column #1 2 3 4 5 6 7 8

TABLE 7E
-202-

	<u>Mandatory Sentence</u>	<u>Discretionary Sentence</u>
1900	23	20
1905	27	23
1910	29	23
1915	30	25
1920	28	26
1925	31	30
1930	35	36
1935	35	36
1940	36	38
1945	37	38
1950	34	39
1955	35	41
1960	37	40
1965	31	40
1970	32	43
1975	31	46
1980	37	40

TABLE 7F
-203-

MAXIMUM PENALTIES UNDER CURRENT
HABITUAL OFFENDER STATUTES

1. MANDATORY LIFE

- a. Any three felonies: Texas, Washington, West Virginia
- b. Any four felonies: Colorado, South Dakota, Wyoming
- c. Violent felonies only: Illinois, Louisiana, Maryland, Mississippi, New York, South Carolina, Tennessee

2. DISCRETIONARY LIFE

- a. Any felonies: Canal Zone, Delaware, District of Columbia, Idaho, Michigan, Montana, Nebraska, Nevada, North Carolina, Oklahoma, Puerto Rico, Vermont, Virgin Islands
- b. Violent felonies only: Alabama, Arkansas, Florida, Hawaii, Kentucky, Missouri, North Dakota, Oregon
- c. Other requirements: Connecticut, Utah

3. LESS THAN LIFE: MANDATORY

- a. Any felonies: Alaska, Arizona, Georgia, Indiana, Massachusetts, New Hampshire, New Mexico, Wisconsin
- b. Violent felonies only: California, Minnesota

4. LESS THAN LIFE: DISCRETIONARY

- a. Any felonies: Kansas, Rhode Island, United States
- b. Other requirements: Iowa

5. NO STATUTE

- a. Maine, New Jersey, Ohio, Pennsylvania, Virginia

Supreme Court, U.S.
FILED

OCT 26 1979

RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO. 78-6386

WILLIAM JAMES RUMMEL,

Petitioner

V.

**W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,**
Respondent

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

BRIEF FOR THE RESPONDENT

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

TED L. HARTLEY
Executive Assistant

W. BARTON BOLING
Chief, Enforcement Division

GILBERT J. PENA
DOUGLAS M. BECKER
Assistant Attorneys General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Respondent

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO. 78-6386

WILLIAM JAMES RUMMEL,

Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The en banc opinion of the Court of Appeals (A. 25)¹ is reported at 587 F.2d 651. The panel opinion of the Court of Appeals (A. 9) is reported at 568 F.2d 1193. The opinion of the district court (A. 4) is not reported.

¹For ease of reference, Respondent, like Petitioner, will cite the record on appeal as "R"; the separately bound Appendix as "A"; Petitioner's separately bound charts as "C"; and Respondent's separately bound Supplement as "S."

JURISDICTION

Petitioner's jurisdictional statement (Brief for the Petitioner at 2) is acceptable.

QUESTIONS PRESENTED

WHETHER RUMMEL'S SENTENCE OF LIFE IMPRISONMENT FOR BEING AN HABITUAL CRIMINAL IS CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT?

WHETHER RUMMEL HAS PROCEDURALLY DEFAULTED ANY RIGHT TO CHALLENGE HIS PUNISHMENT AS CRUEL AND UNUSUAL BY FAILING TO OBJECT UPON THAT OR ANY OTHER BASIS AT THE PUNISHMENT STAGE OF HIS TRIAL?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Petitioner cites and sets forth the Eighth Amendment to the United States Constitution; Sec. 12.42(d) of the 1974 Texas Penal Code: Arts. 63, 979, 996, 1410, 1413, and 1555b, sec. 1, of the 1925 Texas Penal Code (Brief for the Petitioner at 2-5). The following statutes and rules are also involved, and are reproduced in the Supplement "S.":

Tex. Rev. Civ. Stat. Ann. art. 6181-1, secs. 1-4 (Vernon) (S. 1)

Tex. Code. Crim. Proc. Ann. art. 42.12, secs. 12, 15, 20 (Vernon) (S. 2)

Rules, Texas Board of Pardons and Paroles, secs. 205.03.02.001(a)-(h); 2.05.03.02.005; 2.05.03.02.007 (1978) (S. 3).

STATEMENT OF THE CASE

The textual portion of Petitioner's Statement of the Case (Brief of the Petitioner at 5-8) is adequate, except that he neglects to note that the record reflects that at the time of his conviction as an habitual criminal, there were also other charges pending against him (A. 1-2), at least one of which resulted in a felony conviction (A. 3) additional to that for which he received his life sentence, as found by the Court of Appeals (587 F.2d at 659; A. 37). A further glimpse of Rummel's entire criminal history is provided by the recitation of his prior commitments to the Texas Department of Corrections. (See footnote three at 13.)

Also, at the punishment stage of Rummel's bifurcated trial, no objection was made that the imposition of a life sentence constituted cruel and unusual punishment. Instead, Rummel merely informed the trial court that the enhancing allegations in his indictment were true. (R. 226-27). His attorney after some discussion affirmatively stated to the trial court that he had "no objection" to the jury instructions upon the issue of punishment (R. 239-41).

SUMMARY OF ARGUMENT

I. A. No decision of this Court has ever held that a sentence of imprisonment transgressed the Eighth Amendment solely because of its length. It is doubtful that the Founding Fathers ever intended the mere length of a sentence, as opposed to the manner of infliction of a barbarous punishment, to be proscribed by the Eighth Amendment. Quite recently in the context of death penalty cases the Court has written much about Eighth Amendment proportionality analysis. The Court should now announce that many of the dicta in those cases, especially *Coker v. Georgia*, 433 U.S. 584 (1977), are limited in applicability to death penalty cases. This conclusion seems appropriate in

light of the uniquely irrevocable nature of capital punishment. At the very least, the Court should be considerably more reluctant to strike down a revocable punishment like Rummel's than an irrevocable one like Coker's.

B. In any event, Rummel's punishment is constitutionally valid even under properly applied Eighth Amendment proportionality analysis established in *Coker* and other cases. Rummel has demonstrated and owes his habitual offender status to the fact that he is utterly incapable of conforming his conduct to the norms of civilized society. He himself has shown that three prior prison terms have failed to rehabilitate him. The expressed judgment of a Texas prosecutor, grand jury, petit jury, trial court, and appellate court that additional punishment is necessary is not so clearly wrong that its imposition is barred by the Constitution. To contend otherwise, in fact, is, in light of the crude state of the infant science of criminology, to trivialize the Constitution.

This conclusion is particularly clear where Texas' entire statutory scheme, including the operation of relevant good conduct time credit and parole statutes and rules, are considered. Two Circuit Courts of Appeals have properly held that to consider only the sentence imposed upon a convicted criminal defendant and to refuse to consider the practical effects of that sentence would be self-imposed judicial myopia. Examination of the Texas good conduct time credit and parole laws, especially when compared with those of other jurisdictions, reflects that Rummel's sentence is commensurate with that he might have received in other jurisdictions. It is also clear that his actual term of incarceration will be significantly shorter than that of other, more serious offenders also receiving life sentences. The reality is that Rummel's sentence is not disproportionate to the offenses he committed and the

mental state the commission of those offenses evinced.

C. Examination of the same Texas statutes and rules also shows that Rummel's claim that he is a "perpetual prisoner" (Brief of Petitioner at 37) is without merit. If he manifests the indicia of rehabilitation after being paroled in as little as ten years, he may attain annual reporting status in three years and non-reporting status in four additional years. Thus, after ten years in prison and seven years of satisfactory parole, Rummel may achieve a status wherein he practically can only be returned to prison for actual conviction of a crime. This hardly seems too much to ask for an adjudicated habitual criminal. Surely the Texas framework for treatment of recidivist offenders represents a rational effort to rehabilitate them, clearly an acceptable goal of punishment.

D. To embrace a contrary rule would be in the language of Fifth Circuit Judge Thornberry, to "stand on the brink of the 'slippery slope' in its most classic sense." The subjectivity inherent in Rummel's position would necessarily result in chaos and uncertainty in the Texas and many other criminal justice systems. The extent to which the filing of massive numbers of habeas corpus petitions might open the prison floodgates is essentially an unknowable but potentially important factor. Even more important, however, is the uncertainty as to the law on the part of prosecutors, grand juries, and judges. No remotely objective rule of decision is conceivable.

The judgment of the Texas or any other state Legislature, which had been thought to be conclusively demonstrated by the passage of criminal statutes, would no longer be a reasonable basis for the exercise of prosecutorial or judicial discretion. Instead, every criminal justice system would be subject years later to the scrutiny of federal judges and their necessarily

subjective notions of the proper ends of punishment. The costs of such a system of criminal justice simply outweigh any benefits. The inevitable effect would be to eliminate differences in punishment provisions of substantive criminal statutes among the states and to work a "levelling" of approaches among the states. Such a stifling result is undesirable practically and obnoxious philosophically insofar as it eliminates opportunities for difference of approach in an area of human experience, penology and the rehabilitative process, in which certainties are few.

II. Rummel has procedurally defaulted any right to raise his Eighth Amendment claim in federal habeas corpus under *Wainwright v. Sykes*, 433 U.S. 72 (1977). The reason is that he failed to object at his trial to the imposition of his life sentence on that basis, thereby violating the Texas correct contemporaneous objection rule.

The State of Texas raised this defense on appeal--its first opportunity after this Court's decision in *Sykes*. Because the Texas courts do not allow such a claim as Rummel's to be raised for the first time on collateral attack, this Court in the interest of comity should also refuse to entertain it.

ARGUMENT

I.

RUMMEL'S SENTENCE OF LIFE IMPRISONMENT FOR BEING A HABITUAL CRIMINAL IS NOT CRUEL OR UNUSUAL UNDER THE EIGHTH AMENDMENT.

Certainly Texas agrees, in the often quoted words of Mr. Chief Justice Warren, that the Eighth Amendment "must draw its meaning from the evolving standards of

decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). But to assert that Rummel's punishment is barred by the Eighth Amendment is a misapplication of that principle, both historically and logically.

A. This Court Has Never Held that a Sentence of Imprisonment in a Criminal Case Transgressed the Eighth Amendment Solely Because of its Length.

Perhaps the first case in which this Court squarely addressed the meaning of the cruel and unusual punishment clause of the Eighth Amendment was *Wilkerson v. Utah*, 99 U.S. 130 (1879), where the Court upheld the constitutionality of shooting as a form of execution. The Court believed "it is safe to affirm" that the Eighth Amendment forbids such forms of punishment as being "embowelled alive, beheaded, and quartered . . . public dissection . . . and burning alive." *Id.* at 135-36. Accord, *In re Kemmler*, 136 U.S. 436 (1890), where the Court upheld electrocution as a means of inflicting the death penalty.

Next, the Court upheld a second electrocution after the first attempt had been unsuccessful in *Louisiana v. Resweber*, 329 U.S. 459, 464 (1947). The reasoning was as follows:

"The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."

The crux of Rummel's argument is that the Eighth Amendment requires that the punishment carried out against a convicted defendant be proportionate to the offense committed. Apparently the first expression emanating from this Court that has been construed as

supporting this view was the dissenting opinion of Mr. Justice Field in *O'Neil v. Vermont*, 144 U.S. 323 (1892). There, the defendant was heavily fined and sentenced to serve more than fifty-four years at hard labor for the offense of selling intoxicating liquors without authority. Three members of the Court would have barred the punishment as cruel and unusual. The majority, however, refused even to address the contention.

In *Howard v. Fleming*, 191 U.S. 126 (1903), the Court rejected an Eighth Amendment challenge to a sentence of ten years imposed for conspiracy to defraud. In *Badders v. United States*, 240 U.S. 391 (1916) (Holmes, J.), the defendant claimed that a thirty-five year prison sentence, five years for each of seven separate letters deposited in the mail as part of a scheme to defraud, was disproportionate to the offense. The Court rejected this contention.

In *Weems v. United States*, 217 U.S. 349 (1910), the most noted case in this context, the Court considered the validity under the Philippine Bill of Rights the Hispanic sentence of fifteen years in *cadena temporal*. The Court noted that this sentence consisted not merely of fifteen years simple imprisonment for a minor offense, but of fifteen years of hard and painful labor, with chains at ankle and wrist, accompanied by various other civil disabilities far in excess of those associated with modern American parole, both during the term of imprisonment and afterward. It is highly doubtful that without such accessory punishments the Court would have reached the same result. *Weems* is not a case in which it may fairly be said that length of the sentence alone was the basis of decision.

In *Trop v. Dulles*, 356 U.S. 86 (1958), the defendant was sentenced to three years hard labor, loss of citizenship, and other penalties for an act of wartime desertion. The Court held that denationalization is a punishment barred by the cruel and unusual

punishment clause of the Eighth Amendment. In light of such authorities, it is not surprising that in *Spencer v. Texas*, 385 U.S. 554 (1967), the Court simply noted that on numerous occasions the habitual offender statutes of various jurisdictions had been upheld against challenges that the imposition of a life sentence constituted cruel and unusual punishment.²

Several factors should be noted as important in contributing to the formulation of this mass of authority. First, it is improbable that the Framers intended the Eighth Amendment to apply merely to long punishments. Instead, "[I]t appears that the American draftsmen believed that the original intention was to prohibit the inflicting of barbarous physical punishments." Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFF.L.REV. 99, 115 (1971). A contrary conclusion is apparently based on the argument that the Founding Fathers "were mistaken in their interpretation of the English experience" and so erred in intending to prohibit only punishments that are cruel and unusual in their nature. E.g., Granucci, "Nor Cruel and Unusual Punishments Inflicted: The Original Meaning," 57 CALIF.L.REV. 839 (1969). This method of historical exegesis is wholly insupportable.

Finally, there are the death penalty cases. Generally, the Court has held that capital punishment is not unconstitutional per se. *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976). Yet in cases such as *Furman v. Georgia*, 408 U.S. 238 (1972), and *Coker v. Georgia*, 433 U.S. 584 (1977), some members of the Court expressed the opinion that the death penalty constitutes cruel and unusual punishment. For example, in *Coker*, 433 U.S. at 591-92, the Court held:

²A more complete historical statement of the Eighth Amendment is contained in the various opinions of the Court in *Furman v. Georgia*, 408 U.S. 238 (1972).

"In sustaining the imposition of the death penalty in *Gregg*, however, the Court firmly embraced the holdings and dicta from prior cases [citations omitted] to the effect that the Eighth Amendment bars not only those punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed. Under *Gregg*, the punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground."

Such cases should not control the outcome of a case like Rummel's, not involving the death penalty. The reason is that the imposition of the death penalty itself occupies a unique place in Eighth Amendment jurisprudence because of its awesome and irrevocable nature, as this Court and others have said. *E.g., Coker v. Georgia*, 433 U.S. at 598, citing *Gregg v. Georgia*, 428 U.S. 153, 187 (1976); *Furman v. Georgia*, 408 U.S. at 290 (Brennan, J.) and 346 (Marshall, J.); *Carmona v. Ward*, 576 F.2d 405, 409, 415 (2nd Cir. 1978), cert. denied, ___ U.S. ___, 99 S.Ct. 874 (1979); *Hall v. McKenzie*, 537 F.2d 1232, 1235 (4th Cir. 1976). This seems quite proper in light of the constant reviewability by many different means -- e.g., habeas corpus, parole, pardon -- of non-capital punishment.

For these reasons, if proportionality in sentencing is to be required by the Eighth Amendment, then history, precedent, and logic all suggest that at least in the context of punishment less than capital, every reasonable presumption should be indulged in favor of the rationality and, therefore, the constitutionality, of the particular punishment in issue.

B. Consideration of the Entire Texas Statutory Scheme for Infliction of Punishment in Criminal Cases, Especially when Compared to the Schemes of other Jurisdictions, Reflects that Rummel's Punishment is Not Cruel or Unusual.

For the reasons stated above, the Court should more readily accede to the punishment Texas has inflicted upon Rummel than it did the ultimate punishment Georgia unsuccessfully sought to impose upon Coker in *Coker v. Georgia*, *supra*. Yet properly applied proportionality analysis espoused by any Justice or judge of any court--whether this Court in *Coker*, or the Fourth Circuit Court of Appeals in *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 938 (1974), or the dissenters in the court below -- fails to establish that Rummel's sentence is cruelly or unusually disproportionate to his offenses.

1. Rummel's adjudication under Texas law as a habitual criminal justifies severe punishment.

In 1856 the Texas Legislature enacted a statute pertaining to habitual offenders. Paschal, I Laws of Texas 472 (1873). The Texas Penal Code of 1856, art. 2464, provided:

"Any person who shall have been three times convicted of a felony less than capital, shall, on such third conviction, be imprisoned to hard labor for life, in the penitentiary."

This provision was preserved verbatim in subsequent codifications of the Texas Penal Code. Texas Penal Code of 1879, art. 820; Texas Penal Code of 1895, art. 1016; Texas Penal Code of 1911, art. 1620.

In 1925 and 1974 the Texas Legislature modified the former recidivist statute:

"Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."

Texas Penal Code of 1925, art. 63.

* * * *

"If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life."

Tex. Penal Code Ann., sec. 12.42 (Vernon). This section retains the substance of the former provisions.

These statutes have always been strictly construed in Texas, as discussed at some length in the opinion of the Court of Appeals (587 F.2d at 656; A. 31-32) and the Brief of the Petitioner at 57 n.67. First, to invoke these provisions the State must prove that each succeeding conviction was subsequent to both the commission of and conviction for the preceding offense. *Tyra v. State*, 534 S.W.2d 695, 697-98 (Tex. Crim. App. 1976); *Rogers v. State*, 325 S.W.2d 697 (Tex. Crim. App. 1959). No conviction can be used more than once in establishing habitual criminal status. *Ex parte Montgomery*, 571 S.W.2d 182, 183 (Tex. Crim. App. 1978); *Carvajal v. State*, 529 S.W.2d 517, 521 (Tex. Crim. App. 1975), cert. denied, 424 U.S. 926 (1976). These requirements ensure that a habitual criminal is truly one who has exhibited over a long period of time the inability to conform his conduct to the dictates of the criminal law.

Also, a defendant must actually have spent time in prison upon a conviction before it may be used for enhancement. *Cromeans v. State*, 268 S.W.2d 133, 135 (Tex. Crim. App. 1954). This requirement ensures that a long prison term cannot be imposed until the defendant by his own conduct has demonstrated that shorter terms have failed to rehabilitate him.³

Moreover, an out-of-state felony conviction cannot be used for enhancement unless the underlying offense was also a crime in Texas. *Ex parte Scafe*, 334 S.W.2d 170, 171 (Tex. Crim. App. 1960). Mere introduction of certified copies of prior judgments and sentences is insufficient to prove identity of the defendant. *Cain v. State*, 468 S.W.2d 856, 858-59 (Tex. Crim. App. 1971). These and other requirements are designed to afford maximum due process of law to those threatened with habitual offender status.

Thus, as stated by the Court of Appeals, "the following events must happen before Article 63 [or Section 12.42(d)] is ever called into question:

- (1) A defendant must be convicted of a felony and must be sent to prison.
- (2) After the defendant has been convicted of the first felony, he must be convicted of a second

³In the instant case, according to records contained in the Texas Department of Corrections, in addition to juvenile commitments and several short terms in city jails, Rummel served almost eight months in 1965 in the Texas Department of Corrections on his 1964 conviction for theft by credit card before being paroled on September 28, 1965. His parole was revoked on July 21, 1966, and he served nine additional months before being discharged on May 25, 1967. He was returned to the Texas Department of Corrections on March 25, 1969, to serve a four year sentence received following his conviction for forgery. He was discharged on March 26, 1971. Following his two additional felony convictions on April 10, 1973, he arrived in the state penitentiary for the fourth time, where he has remained ever since.

felony. Again, the defendant must be given a prison term.

(3) After the defendant has been convicted of the second felony and sent to prison for the second time, the defendant must be convicted of a third felony." (footnote omitted)

(587 F.2d at 656-57; A. 32.)

According to an authority relied upon by the Court of Appeals -- Note, "Don't Steal a Turkey in Arkansas -- The Second Felony Offender in New York," 45 FORDHAM L. REV. 76, 78-79(1976), most states do not afford the same range of protection to accused habitual offenders:

"Other states require that the defendant have been previously convicted, sentenced and 'placed on probation, paroled, fined or imprisoned....' Florida demands a 'formal adjudication of guilt,'.... In other jurisdictions, a verdict or a plea of guilty is all that is necessary to implement added sanctions. Other opinions indicate that simultaneous, multiple convictions may be used for the purpose of applying recidivist statutes." (footnotes omitted).

(587 F.2d at 657; A. 32.)

Thus, Rummel was duly and legally convicted of committing four felony offenses over a period of nine years in Bexar County, Texas. The record does not fully reflect what other offenses the district attorney knew that Rummel had committed during this time, although the decision of a prosecutor to exercise his discretion to seek a sentence of life and that of a grand jury to exercise its discretion to return a habitual offender indictment under these circumstances is commonly spurred by

such considerations.⁴

It is fundamental, therefore, that Petitioner did not receive a life imprisonment merely because he committed three offenses totaling \$230.00 in booty. He did not receive such a sentence merely because the prosecutor knew that he stood convicted of a total of four felony offenses over a period of nine years, nor merely because the prosecutor knew of other crimes he had committed.

Instead, Rummel received a sentence of life imprisonment because over a long period of time he had exhibited a total inability to conform his conduct to the norms established by civilized society. That imprisonment for various terms shorter than life imprisonment had failed to effect either his rehabilitation or to achieve any deterrent effect within him is tautologically obvious. For such a pattern of consistently criminal conduct, Rummel eventually received his life sentence. It is absurd to suggest that the slowly emerging science of criminology is sufficiently precise to establish with any degree of certainty that the approach taken is doomed to failure or that any other approach would guarantee success.

2. Texas' liberal good conduct time credit and parole statutes and rules operate so as to significantly diminish the superficial harshness of a "life sentence" in Texas in comparison to other jurisdictions.

It is impossible to assess the true meaning of

⁴Texas, aware of the appendix to the amicus curiae brief filed by the district attorney, Bexar County, Texas, containing certified copies of Rummel's numerous convictions, asks that the Court note the alternative prayer for relief in the Conclusion that this cause be remanded to the district court for consideration of "all the circumstances of Rummel's entire criminal history."

Rummel's sentence or to compare it to others without a close examination of several Texas statutes. First, it is established in Tex. Code Crim. Proc. Ann. art. 42.12, sec. 15(b) (Vernon) that any prisoner is eligible to be paroled provided that he has served one-third of the maximum sentence or twenty years. (S. 2) That statute further provides that except in the case of certain enumerated violent crimes -- murder, kidnapping, rape, sexual abuse, and robbery -- all inmates "shall be eligible for release on parole when their calendar time served plus good conduct time equals one-third of the maximum sentence imposed or 20 years, whichever is less." *Id.*

The Texas statutes also provide for the awarding of additional time credit for good conduct while in prison. Tex. Rev. Civ. Stat. Ann. art. 6181-1 (Vernon) -- formerly art. 6184-1 -- provides that prisoners are entitled to twenty days per month deduction in time from the terms of their sentences for Class I prisoners, ten days per month for Class II prisoners, and thirty days per month for a state approved trusty. (S. 1)

The Rules of the Texas Department of Corrections provide that an entering inmate begins as a Class I prisoner and so receives twenty days per month credit on his sentence, or a total of fifty days credit on his sentence for each month spent in the penitentiary. Thus, even if an inmate never achieved the status of trusty, he would accumulate fifty days of time credit for each month served. A twenty year sentence in this manner could be and commonly is served by a Class I prisoner in a little more than twelve years. (See S. 12, S. 13, S. 15 Table 28).

If a prisoner achieved trusty status, he could serve a twenty year or a life sentence in ten years. The Court of Appeals so found. (587 F.2d at 658; A. 34.) Available statistical evidence from various sources corroborates this conclusion. (See S. 9-13, S. 15 Table 28, S. 16).

Hence, it follows that Rummel has in fact received an indeterminate sentence. He may be released in as little as ten years. On the other hand, if he evinces no demonstrable indicia of rehabilitation, he may never be released.

An examination of the good time and parole statutes of other jurisdictions is startling. (See S. 6-8.) Although the statutes of many other jurisdictions are similar to that of Texas in providing that inmates are eligible for parole after having served one-third of their sentence or twenty years,⁵ virtually *no* other jurisdiction provides an opportunity comparable to the State of Texas in the awarding of good time credit. Virtually *all* such jurisdictions provide an opportunity for significantly less time credit.

To select one obvious example for comparative purposes, 18 U.S.C. §3575 provides for a sentence of twenty-five years for some habitual offenders. It is further provided in 18 U.S.C. §4161 that a federal prisoner may earn a maximum of ten days per month good time credit. Thus, the coalescing of these statutes means that a federal prisoner serving a sentence as an habitual offender might discharge that sentence in approximately sixteen years -- *six years longer* than the time in which a Texas habitual offender like Rummel might be released from incarceration upon his sentence. Texas contends that examination of the meaning of a life sentence or that sentence provided for by habitual offender statutes in other jurisdictions reveals that a Texas prisoner convicted of being an habitual offender and for that reason receiving a life sentence may serve significantly less time than similarly situated prisoners

⁵ See NATIONAL COUNCIL ON CRIME AND DELINQUENCY, "Parole in the United States: 1976 and 1977" at 22, 48. (July, 1978). Parole eligibility varies greatly among states insofar as technical requirements are concerned, but one-third of maximum sentence is a common measure.

in most and possibly all such other jurisdictions if he evinces the indicia of rehabilitation.

Rummel urges that the Court refuse to consider the workings of the Texas good time and parole laws or to compare them to the workings of such statutes in other jurisdictions. First, he argues, like the original panel opinion in the Court of Appeals, "It is no answer to suggest that the sentence imposed may never be carried out in fact, because the threat itself makes the punishment obnoxious." (568 F.2d at 1196 n. 4.; A. 12.)

This statement simply distorts reality in a case like Rummel's. The Court might hypothesize a situation in which a convicted defendant like Rummel were confronted with a choice of punishment. Suppose that he were offered on the one hand a punishment such as that potentially posed by other statutes: that is, between, for example, sixteen and twenty-five years imprisonment, depending upon his conduct. Suppose that the alternative punishment were that provided by the Texas statute: that is, between ten years imprisonment and imprisonment for the remainder of his natural life, depending upon his conduct. Different defendants confronted with such a choice might vary significantly in their desires. Certainly, however, neither sentence is clearly so much more severe than the other that its infliction might be characterized as grossly disproportionate. Similarly, the Court of Appeals reasoned as follows:

". . . Rummel has made no attempt to demonstrate what the actual jail times in the various jurisdictions would amount to. An example will illustrate our point. Suppose that State A gives a ten year sentence for theft and State B gives a thirty year sentence for the same theft. State A has a practice of fixed and determinate sentence and does not award early release based on good time or discretionary

parole. State B, however, is similar to Texas and through long experience it can be shown that the thirty year sentence amounts to about ten years' imprisonment. Can it justifiably be said that State B punishes the theft three times more severely than State A? This Court thinks not.

A variation of this very possibility might be found in our own circuit. In Georgia, upon conviction of the fourth felony, the defendant receives the mandatory maximum without parole. Ga. Code Ann. §27-2511. Rummel's equivalent offense in Georgia is theft by deception, Ga. Code Ann. §26-1803, and the maximum penalty is ten years, Ga. Code Ann. §26-1812. Considering the no parole provision, Rummel's imprisonment in Georgia would be approximately the same as his imprisonment in Texas." (footnotes omitted)

(587 F.2d at 660; A. 38.)

Thus, it is obvious that it is a terrible oversimplification to assert that next to the death penalty, life is "the ultimate punishment imposed by this society for those crimes most abhorrent to it." (E.g., *Rummel v. Estelle*, 568 F.2d at 1196; A. 13.) Instead, the ultimate such punishment must certainly be life imprisonment with no possibility of parole. Such a punishment is provided for in several states. (See C. 113 *et seq.*) Surely the second most severe punishment must be a sentence of life imprisonment in that jurisdiction that provides the least amount of good time credit during incarceration.

Far down the hierarchy must fall Rummel's sentence in the instant case. His sentence in this light may be seen as significantly less severe than that afforded in many other jurisdictions to habitual offenders such as himself or to other prisoners serving life sentences. The Court of

Appeals so found:

"The record in this case reveals that Rummel was convicted of a fourth felony on the same day he was sentenced under Texas habitual offender statute. Three states punish a three time offender with a mandatory life sentence, and three states provide for a discretionary life sentence for a three time offender. Three states punish a four time offender with a mandatory life sentence, and eight states provide for a discretionary life sentence for a four time offender. Given these facts, it appears that up to a possible six states would sentence Rummel to a life term and up to eleven states would give discretion to the court to determine Rummel's sentence." (footnotes omitted.)

(587 F.2d at 659-60; A. 37.)

Moreover, because the Texas Board of Pardons and Paroles exercises its discretion to award release upon parole to prisoners serving life sentences for relatively less serious crimes *significantly sooner* than prisoners with life sentences serving more serious crimes (See S. 9, S. 10), it is obvious that the severity of a life sentence among Texas prisoners may also vary significantly. Therein lies the fallacy in stating that Texas has punished Petitioner disproportionately severely in comparison to other more vicious Texas criminals.⁶

There is no basis for the statement of the dissenters in the Court of Appeals and for Rummel's wholly uncorroborated assertion that "Texas is the most reluctant

⁶In a related argument, Petitioner complains that the habitual offender laws "isolate only petty offenders." (Brief for the Petitioner at 48-51). The obvious reason that few murderers or rapists are prosecuted under such statutes is that they commonly receive long sentences after one or two such offenses.

[State in the country] to grant parole." (587 F.2d at 658, 666; A. 35, 46; Brief for the Petitioner at 32-33.) All available evidence, in fact, indicates that Texas ranks approximately average in its willingness to approve parole applications. (See S. 15, Tables 2, 3, 21, 26, 28; S. 17.)

In fact, available statistics indicate that approximately forty per cent of inmates are granted parole in their *first year* of eligibility. Of those passed over, more than sixty-four per cent are granted parole in their second year of eligibility. By the third and fourth year of eligibility, the figure approaches one hundred per cent. (S. 16) Coupled with the much quicker rate at which Texas prisoners attain parole eligibility status, these figures strongly corroborate the conclusion of the Court of Appeals majority and the contention of Texas that it is extremely unfair and unrealistic to equate a Texas sentence with others of equal length in other jurisdictions.

To cause Rummel's life sentence to appear comparatively onerous, in fact, can only be achieved by focusing in a manifestly unfair and unrealistic manner upon a very small portion of the entire Texas statutory sentencing scheme. That scheme admittedly imposes upon Petitioner a sentence facially more extreme than that possible in numerous other jurisdictions, and possibly than in all of them. At the same time, however, the Texas statutes operate to reduce the length of the sentence much more than that possible in numerous other jurisdictions, and possibly than in all of them.

Texas cannot understand the logic by which the Eighth Amendment to the United States Constitution, especially in light of the uncertainties of "the infant science of criminology," see *McGautha v. California*, 402 U.S. 183, 221 (1971), may be interpreted to invalidate the Texas scheme of punishment -- which in reality may well cause Rummel to serve the same amount of time as

he would have served in many other jurisdictions for the offenses he committed and significantly less time than other more serious offenders in his own jurisdiction.

In this regard Texas relies heavily upon the reasoning of the Second Circuit Court of Appeals in *Carmona v. Ward*, 576 F.2d 405, 413-14 (2d Cir. 1978), cert. denied, ___ U.S. ___, 99 S.Ct. 874 (1979):

"We cannot agree that the recognized probability of parole in cases before us was to be ignored when the court determined whether the statutory punishment was unconstitutional as applied to appellees. On the one hand, we are asked to look at all the circumstances which would ameliorate the seriousness of petitioners' offenses and their individual culpability in order to justify a finding that their punishment was constitutionally offensive. On the other hand, we are asked in effect to consider the appellees so incorrigible that they must be deemed destined to durance vile for the rest of their natural lives because they will never be paroled. We do not consider this to be a realistic or practical approach."

Finally, further precedential support for consideration of the *entire* statutory scheme of punishment in Texas and, therefore, the operation of its time credit and parole statutes and rules, is found in the cogent statement of Mr. Justice Marshall in *Furman v. Georgia*, 408 U.S. 238, 361 (1972):

"[W]hether or not a punishment is cruel and unusual depends, not on whether its mere mention 'shocks the conscience and sense of justice of the people,' but on whether *people who were fully informed as to the purposes of the penalty and its liabilities* would find the penalty shocking, unjust, and unacceptable." (emphasis added).

Surely the Court must allow itself to be thusly fully informed before passing judgment on the manner in which Texas has promulgated and enforced its criminal statutes in the instant case.

C. There Is A Rational Basis For Concluding That Rummel's Sentence Will Contribute To Acceptable Goals of Punishment.

Texas believes that all the foregoing establishes that the Texas system of punishment is both rational within itself because it differentiates insofar as actual penitentiary time is concerned among various types of offenders and also rational compared to other penal systems insofar as such time is concerned. Texas also notes that "Rummel cannot gain any advantage by positing a more rational system than the one in existence: He must demonstrate that the system in existence is an irrational one." (*Rummel v. Estelle*, 587 F.2d at 662; A. 41.)

Rummel makes two further attacks upon the rationality of the Texas system. First, he asserts that "if a life sentence without possibility of parole for three petty, nonviolent offenses would be unconstitutional . . . then surely the added 'crime' of a 'bad attitude' in prison, virtually guaranteeing rejection of a prisoner's parole application and assuring him of lifetime imprisonment, should not make the sentence any less constitutionally infirm." (Brief for the Petitioner at 35). Of course, this view greatly oversimplifies the parole process and trivializes the work of the Texas Board of Pardons and Paroles. A full discussion and enumeration of the Board's guidelines and rules concerning parole are set forth in S. 14.

Second, Rummel incredibly asserts that the prospect of parole itself is depressing and destructive of the proper ends of punishment:

"Thus, Rummel is a perpetual prisoner. No matter how much he rehabilitates during the next approximately 13,770 days of his life expectancy, he will either die in prison or live on perpetual parole, with the ever-present possibility of re-incarceration. Such a depressing prospect will inevitably breed hopelessness and preclude effective treatment and rehabilitation."

(Brief for the Petitioner at 37.)

There are several reasons why this melodramatic portrayal of parole is inaccurate. First it should be noted that the terms and conditions of parole in Texas, which are set forth in S. 3-5, are not more onerous than those employed generally in the United States. See LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPARTMENT OF JUSTICE, "Sourcebook of Criminal Justice Statistics - 1978," Table 1.121 at 220-21 (June, 1979). The Court of Appeals, in fact, reacted to Rummel's complaint in this regard as follows:

"Rummel suggests that even if he is paroled, he is still on probation and lifetime probation is in itself cruel and unusual punishment. This argument need not detain us long. We cannot understand how a lifetime requirement of good behavior is too much to ask of a habitual criminal."

(587 F.2d at 659 n. 19; A. 36.)

Second, Rummel has in any event badly misstated his situation. The Rules of the Board provide that after a paroled habitual offender satisfactorily completes three years of monthly reporting supervision, he may be placed on annual reporting status. RULES, Texas Board of Pardons and Paroles, sec. 205.03.02.005; S. 4.

Such status greatly reduces his obligations while on parole -- and, concomitantly, greatly reduces the reasons why his parole can be revoked. Equally important, the parolee need only report once per year by mail.

Further, after four years on annual reporting status, the parolee may attain non-reporting status. RULES, Texas Board of Pardons and Paroles, sec. 205.03.02.007; S. 4-5. Such status means that he need report his activities to no one -- not even in writing -- and most significantly, means essentially that his parole as a practical matter can only be revoked for actual criminal convictions.

Moreover, it appears that criminal and non-reporting status are routinely granted to those parolees who qualify by completing satisfactorily the requisite term. Finally, all available statistics demonstrate that the vast majority of Texas parolees satisfactorily complete their parole. (S. 1 Tables 4-11, 30).

This is not the status of a perpetual prisoner. Instead, these Rules are part of a system to carefully oversee the rehabilitation of the habitual and other types of criminals. The degree of freedom afforded such offenders is gradually escalated according to their conduct. Clearly the Texas plan for treatment of habitual offenders like Rummel, which includes ten to twelve years of incarceration followed by three years of direct parole supervision and four years of annual reporting, measurably contributes to the proper ends of punishment.

D. A Holding That Rummel's Punishment is Cruel and Unusual Would Be Destructive of the Ends of Justice.

Judge Thornberry, originally dissenting in the Court of Appeals to the panel opinion and later the author of

the en banc majority opinion, correctly stated as follows:

"Whatever sociological analysis I might apply to this case, I cannot avoid the conclusion that with this decision we stand on the brink of the 'slippery slope' in its most classic sense."

(*Rummel v. Estelle*, 568 F.2d at 1202; A. 23.) If Rummel prevails in this Court, Judge Thornberry's admonition will prove true in several senses.

1. The numbers of prisoners in Texas and elsewhere that would be affected by such a holding is unknowable but potentially great.

Petitioner in his Table 1 (C. 1-21) collates the circumstances of a number of Texas habitual offenders. He concludes that only eight of three hundred eighty will be able to claim that their case is within the ambit of the holding he seeks to have the Court announce. He cavalierly concludes, "There will be no flood, just a trickle." (Brief for the Petitioner at 67 n. 83). Apart from the obvious defects in the methodology employed in utilizing only published opinions of the Texas Court of Criminal Appeals (*and see* the factors contained in Rummel's Table 1, at C. 1), even his own statistics contradict that conclusion.

In addition to the eight cases cited, the holding contended for by Rummel would be potentially applicable to all those cases in which he located one non-violent offense and two unknown offenses (30 cases), as well as those containing two non-violent offenses and one unknown offense (8 cases). (C. 19-21). Forty-six of three hundred eighty cases is a significant ratio.

2. Great confusion and even chaos would needlessly be caused among prosecutors, grand juries, and sentencing authorities.

Perhaps even more important, such a holding would introduce complete uncertainty among prosecutors, grand juries, and sentencing authorities as to the proper range of punishment in a wide variety of contexts. In the instant case, for example, Rummel contends that a sentence of life imprisonment is too much, but fails to elucidate an acceptable range of punishment for himself. Those responsible for enforcing the law in the criminal justice systems in Texas and elsewhere would simply be informed that the totality of the circumstances of a criminal defendant's offenses must be examined, in conjunction with the possible penalties that he might receive in other jurisdictions and in Texas for more serious offenses, when determining the constitutionally permissible range of punishment for a defendant's conduct. There is no guidance, for example, as to whether the burglary of a vehicle includes a "potential for violence" sufficient to invoke the statute. Nor does Rummel tell us whether "purely property offenses" when connected with public administration are raised to a level of strong social interests.

For example, bribery, Tex. Penal Code Ann. sec. 36.02 (Vernon); coercion of a public servant or voter, sec. 36.03; and official misconduct, sec. 39.01; are purely property offenses and are classified as felonies by the Texas Legislature. Numerous gambling offenses are purely property offenses and are classed as felonies. Tex. Penal Code Ann. secs. 47.01 *et seq.* (Vernon). Rummel would give us little guidance as to the proper range of punishment for such offenses. Apparently, each local district attorney, grand jury, and judge or petit jury in Texas that may contemplate a prosecution under such a statute must initially decide what important social interests are served by enforcement of the statute, even though that issue had supposedly been resolved when the Legislature approved that statute. Then local officials must compare the punishment to that possible for more "serious" offenses in Texas, as

well as that possible for comparable offenses in other jurisdictions. Finally, there must be resolved whether a less severe sentence than that permissible under the statute would serve valid rehabilitative, deterrent, and punitive purposes in light of all the above circumstances. This is simply too much to ask.

Moreover, the ambit of the opinion Rummel seeks would apply to "petty" property offenses. He understandably, however, fails to provide the dollar amount of the dividing line between petty and major offenses.

An infinite variety of variables is possible. The en banc Court of Appeals calculated that under the Texas Penal Code, there are approximately 45,190 combinations of crimes that might result in a habitual offender status and that "sooner or later, this court could expect to see many of them." (587 F.2d at 662 n. 29; A. 41.) Previously, the discretion as to punishment of crimes was thought to be properly exercised by Texas prosecutors, grand juries, and if no habitual offender statute were invoked, by the sentencing authority, whether judge or jury. Under the result contended for by Rummel, the range of punishment for many crimes would be unknown.

For such reasons as these, it is not surprising that this Court has previously expressed its reluctance to become involved in expressions of the appropriate punishment in certain circumstances:

"In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, see *Radzinowicz*, *The History of English Criminal Law: The Movement for Reform, 1750-1833, passim*, these are peculiarly questions of legislative policy."

Gore v. United States, 357 U.S. 386, 393 (1958). See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 93 (1820).

3. The inevitable "levelling" effect would be destructive of the proper ends of democratic society and our federal system of government.

One final unfortunate result of a holding in Rummel's favor should be noted. Under such a holding, Texas under the Eighth Amendment would not be free to adopt a punishment scheme for its criminal offenders in which a relatively greater punishment than in other jurisdictions may be imposed at the outset of the defendant's incarceration in exchange for significantly greater reductions of sentence as indicia of rehabilitation are shown. Instead, Texas would be told the Constitution requires a levelling so that the Texas statutes most closely resemble those of other jurisdictions. This flies in the face of Mr. Justice Brandeis's famous admonition that the states should be free to act as laboratories of national experience. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (dissenting opinion). It would violate this Court's admonition in *McGautha v. California*, 402 U.S. 183, 221 (1971):

"[T]he Federal Constitution, which marks the limit of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court."

States, in short, within the limits of constitutional principles much broader than those espoused by Rummel, should be permitted to structure criminal law

"free from the suffocating power of the federal judge, purporting to act in the name of the Constitution." *Planned Parenthood v. Danforth*, 428 U.S. 52, 93 (1976) (White, J., concurring in part and dissenting in part).

Surely this case is a classic one in the manner in which its facts cry out for the exercise of judicial restraint in the face of an admittedly tempting opportunity to embark upon a grand but unwise incursion into state criminal law. In placing this case in proper perspective in this regard, Texas cannot improve upon the statement of Judge Thornberry of the Court of Appeals, originally dissenting to the panel opinion:

"Perhaps, if I were the prosecutor, I would not have sought an indictment charging the defendant with an habitual count; if I were a state lawmaker I would vote to amend the statute so that it would not be applied as has been done here; or if I were governor of the State of Texas, I would consider the petitioner a prime candidate for clemency. But I do not hold these offices and my decision must be guided by the eighth amendment rather than my feelings of compassion and justice. In that amendment, I find nothing that compels the result reached by the majority."

(568 F.2d at 1201; A. 20.)

It has never been thought that the cruel and unusual punishment clause of the Eighth Amendment mandated the results contended for by Rummel and discussed above. Texas avers that it does not.

4. Rummel has no basis for attacking the prosecutor's valid exercise of discretion in indicting him as a habitual offender.

Rummel correctly notes the mandatory nature of the life sentence he received after the prosecutor alleged

and proved the requisite prior convictions. The Texas prosecutor, like his counterpart elsewhere, is vested with much discretion in the charging process as in many other areas. A holding that Rummel's sentence is constitutionally impermissible would necessitate holding that the prosecutor abused his discretion in the charging process.

Common sense dictates that a state prosecutor must assess a constellation of factors in setting priorities and goals in the types of crimes he desires to prosecute and the appropriate penalties he will seek under various circumstances. Texas doubts that the Court believes that the lower federal courts should be in the business of overseeing the daily exercise of prosecutorial discretion in the absence of any suggestion of vindictive or otherwise improper motives.

Such a holding would be contrary to the prior teachings of the Court in such cases as *Santobello v. New York*, 404 U.S. 257 (1971), and *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). Endowing federal district courts with the authority to strike down state criminal penalties as excessive on an ad hoc basis would, in light of the complexity of the Texas Penal Code, create a horde of obvious problems for both Texas prosecutors and the lower federal courts.

If, however, Texas is wrong on this point, then the State suggests at the very least it is entitled to demonstrate all factors bearing upon the original prosecutorial decision, particularly the full extent of Rummel's entire criminal history. It would be more than a little unfair, in fact, to deprive Texas of the opportunity to show Rummel's other crimes to demonstrate the reasonableness of the prosecutor's decision to seek enhancement merely because Texas law does not require such other crimes to be alleged or proved at trial.

Therefore, if the Court is dissatisfied that the record in its present state authorizes the punishment imposed, Texas prays for a remand to the district court where the State believes that it is entitled to submit additional evidence in support of the valid exercise of prosecutorial discretion in Rummel's case. (See footnote three at 13 and footnote four at 15, above.)

II. PETITIONER HAS PROCEDURALLY DEFAULTED ANY RIGHT TO CHALLENGE HIS PUNISHMENT AS CRUEL AND UNUSUAL BY FAILING TO OBJECT UPON THAT OR ANY OTHER BASIS AT THE PUNISHMENT PHASE OF HIS TRIAL.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), a Florida criminal defendant failed to make a timely objection to the admission of his inculpatory statements as required by that state's procedural rules. This Court, relying upon its earlier decisions in *Francis v. Henderson*, 425 U.S. 536 (1976), and *Estelle v. Williams*, 425 U.S. 501 (1976), held that absent a showing of cause for the failure to comply with the state rule and resulting actual prejudice, a federal habeas corpus review of petitioner's *Miranda* claim was barred.

Thus, *Wainwright v. Sykes, supra*, established a rule of review in habeas corpus law that has come to be recognized as the procedural default doctrine. The doctrine stands in marked contrast to the waiver rules enunciated in *Johnson v. Zerbst*, 304 U.S. 458 (1938), in that the subjective mental state of petitioner or his attorney is irrelevant to its application. It is only required that the record reflect a failure to object in compliance with a state procedural rule. See Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX.L.REV. 193, 209-13 (1977).

Under well-established Texas law, criminal trial error is preserved for appellate or collateral review only

if a timely objection is made upon the same ground as that later asserted. See, e.g., 5 TEX.JUR.2d, *Appeal & Error--Criminal Cases*, sec. 22 at 42-43, sec. 35 at 56 (1959); *Ex parte Gill*, 509 S.W.2d 357 (Tex. Crim. App. 1974); *Ex parte Bagley*, 509 S.W.2d 332 (Tex. Crim. App. 1974); *Aldrichetti v. State*, 507 S.W.2d 770 (Tex. Crim. App. 1974); *Spead v. State*, 500 S.W.2d 112 (Tex. Crim. App. 1973).

The Fifth Circuit Court of Appeals has termed the Texas rule the "correct contemporaneous objection rule," *Jiminez v. Estelle*, 557 F.2d 506, 507 (5th Cir. 1977), and has specifically upheld the rule as serving a legitimate state interest. See, e.g., *Jiminez v. Estelle, supra*; *Nichols v. Estelle*, 556 F.2d 1330 (5th Cir. 1977), cert. denied, ___U.S._, 98 S.Ct. 744 (1978); *Loud v. Estelle*, 556 F.2d 1326 (5th Cir. 1977); and *St. John v. Estelle*, 544 F.2d 894 (5th Cir.), aff'd en banc, 563 F.2d 168 (5th Cir. 1977). Cf. *Wainwright v. Sykes, supra*, 433 U.S. at 83 n. 8; *Henry v. Mississippi*, 379 U.S. 433 (1965).

Rummel's trial record is devoid of any objection that the imposition of a life sentence for his crimes constituted cruel and unusual punishment under the Eighth Amendment. Rummel not only made no pre-trial motion to quash the enhancing allegations of his indictment, see Tex. Code Crim. Proc. Ann. art. 27.03 (Vernon), but plead "true" to them at the punishment stage of his bifurcated trial. (R. 226-27). He did not object to the introduction into evidence of the prior convictions. Subsequently, the trial court asked his counsel, "Any objections to the proposed charge of the Court on punishment, Mr. Cheanault?" [sic] (R. 239). After some discussion, Chenault replied, "I have no objection." (R. 241).

The procedural default doctrine is clearly applicable,⁷

⁷Rummel failed to raise his Eighth Amendment claim on appeal. His attempt to raise it on state habeas corpus was summarily re-

unless Rummel can show "good cause" for having failed to object properly at his trial and resultant "actual prejudice." *Wainwright v. Sykes, supra*, 433 U.S. at 90-91. He cannot overcome the "good cause" hurdle in light of his full and fair opportunity to object at his punishment hearing. Indeed, the only cause that Rummel advances is mistake of counsel (Brief for the Petitioner at 72). But as the Fifth Circuit has correctly reasoned, the mistake or ineffective assistance of counsel cannot satisfy the cause exception:

"[P]etitioner has not demonstrated cause for failing to make a timely challenge. His only allegation in this regard is that his trial attorney provided ineffective assistance of counsel in failing to so object. This assertion must be rejected, however, for, if accepted, it would effectively eliminate any requirement of showing cause at all. If a petitioner could not demonstrate any legitimate cause, he would only have to raise the spectre of ineffective assistance of counsel to get his challenge heard. This we refuse to sanction."

Lumpkin v. Ricketts, 551 F.2d 680, 682-83 (5th Cir. 1977). See, *Loud v. Estelle*, 556 F.2d 1326, 1329-30 & n. 11 (5th Cir. 1977); cf. *Jiminez v. Estelle, supra*. A contrary rule would effectively eliminate the holding in

jected by the state conviction court (R. 35). Even if that rejection were construed as a decision on the merits, Rummel cannot evade the effect of the procedural default doctrine by asserting that his is "a case where the state courts have declined to impose a waiver but have considered the merits of the prisoner's claim." See, *Francis v. Henderson*, 425 U.S. 536, 542 n. 5 (1976). That doctrine refers to a state's uniform policy for non-application of its waiver doctrine, as is apparent from examination of *Lefkowitz v. Newsome*, 420 U.S. 283 (1975). It has no application where the state waiver doctrine remains available as an alternate basis for denial of relief.

Wainwright v. Sykes. The exception, in short, cannot be allowed to swallow the rule.

The Court of Appeals nevertheless rejected Texas' procedural default contention for two reasons, both of which are erroneous. First, the court held that the Texas Court of Criminal Appeals "has repeatedly rejected Rummel-like challenges to the Texas habitual criminal statute" and that Rummel should not have been required to "make a futile gesture at his trial." (587 F.2d at 653; A. 27.) Apart from the fact that nothing in *Sykes* sanctions a futility exception to the procedural default doctrine, Rummel has always insisted that his case is a more compelling one than those previously presented. Certainly nothing in the Texas cases rejecting "Rummel-like challenges" precludes the possibility that the Texas Court of Criminal Appeals might in a proper case find a sentence cruel and unusual solely because of its length, any more than the several previous Fifth Circuit cases rejecting such challenges precluded a Fifth Circuit panel from finding for Rummel. This is especially so since Eighth Amendment proportionality requires a case-by-case analysis.

Second, the en banc court noted that Texas requires no contemporaneous trial objection by a criminal defendant to challenge later the constitutionality of the statute under which he was convicted,⁸ citing *Gann v. Keith*, 253 S.W.2d 413, 417 (Tex. 1952). But Rummel does not challenge the constitutionality of that statute; he recognizes that *Spencer v. Texas*, 385 U.S. 554 (1967),

⁸In a related argument Rummel contends that Texas law does not impose a waiver for failure at trial to raise a constitutional claim not yet established. (Brief for Petitioner at 70). This argument fails because of his further claim that proportionality in sentencing as a constitutional principle rests on many older cases including *Weems v. United States*, 217 U.S. 349 (1910), and was reaffirmed in other cases, including *Furman v. Georgia*, 408 U.S. 238 (1972). Rummel's trial occurred in 1973.

and many other cases would be adversely dispositive of any such contention. Instead, he contends the statute is unconstitutional *as applied to him*. Each such challenge obviously rests upon its own facts and is precisely the type of question best raised initially at the trial court and as to which the trial judge should make the initial determination. In short, valid state interests would be served by applying *Wainwright v. Sykes* to this case.

Finally, Rummel attempts to invoke Rule 8(c), Federal Rules of Civil Procedure, in support of his proposition that the State has "waived its procedural default defense by failing to raise it in the district court. (Brief of Petitioner at 69). But *Wainwright v. Sykes* was not decided until after the district court proceedings were concluded and after the initial briefs were filed in the Court of Appeals. In fact, Texas raised the issue at its first opportunity -- before the en banc Court of Appeals.

In any event, Rule 11, Rules Governing Section 2254 Cases, provides that the Rules of Civil Procedure "to the extent that they are not inconsistent with these rules, may be applied, when appropriate," to habeas cases. Quite obviously, the application of Rule 8(c) is discretionary. In this case, where important comity interests are at stake, every valid factor inveighs against application of the rule.

CONCLUSION

For these reasons, the State of Texas respectfully prays that the judgment of the United States Court of Appeals be affirmed; or, in the alternative, that this cause be remanded to the United States District Court for the Western District of Texas for consideration of all the circumstances of Rummel's entire criminal history.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

TED L. HARTLEY
Executive Assistant

W. BARTON BOLING
Chief, Enforcement Division

GILBERT J. PENA
Assistant Attorney General

DOUGLAS M. BECKER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
512/475-3281

Attorneys for Respondent

Supreme Court, U.S.
FILED
OCT 16 1979
CLERK RODAK, JR.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO. 78-6386

WILLIAM JAMES RUMMEL,
Petitioner
V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

SUPPLEMENT TO
BRIEF FOR THE RESPONDENT

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

TED L. HARTLEY
Executive Assistant

W. BARTON BOLING
Chief, Enforcement Division

GILBERT J. PENA
DOUGLAS M. BECKER
Assistant Attorneys General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Respondent

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Tex. Rev. Civ. Stat. Ann. art. 6181-1 (Vernon):

Section 1. For the purpose of this Article:

(1) "Department" means the Texas Department of Corrections.

(2) "Director" means the Director of the Texas Department of Corrections.

(3) "Inmate" means a person confined by order of a court in the Texas Department of Corrections, whether he is actually confined in the institution or is under the supervision or custody of the Board of Pardons and Paroles.

(4) "Term" means the maximum term of confinement in the Texas Department of Corrections stated in the sentence of the convicting court. When two or more sentences are to be served consecutively and not concurrently, the aggregate of the several terms shall be considered the term for purposes of this Article. When two or more sentences are to run concurrently, the term with the longest maximum confinement will be considered the term for the purposes of this Article.

Sec. 2. The department shall classify all inmates as soon as practicable upon their arrival at the department and shall reclassify inmates as circumstances may warrant. All inmates shall be classified according to their conduct, obedience, industry, and prior criminal history. The director shall maintain a record on each inmate showing all classifications and reclassifications with dates and reasons therefor.

Sec. 3. (a) Inmates shall accrue good conduct time based upon their classification as follows:

(1) 20 days for each 30 days actually served while the inmate is classified as a Class I inmate;

(2) 10 days for each 30 days actually served while the

inmate is classified as a Class II inmate; and

(3) 10 additional days for each 30 days actually served if the inmate is a trusty.

(b) No good conduct time shall accrue during any period the inmate is classified as a Class III inmate or is on parole or under mandatory supervision.

Sec. 4. Good conduct time applies only to eligibility for parole or mandatory supervision as provided in Section 15, Article 42.12, Code of Criminal Procedure, 1965, as amended, and shall not otherwise affect the inmate's term. Good conduct time is a privilege and not a right. Consequently, if during the actual term of imprisonment in the department, an inmate commits an offense or violates a rule of the department, all or any part of his accrued good conduct time may be forfeited by the director. The director may, however, in his discretion, restore good conduct time forfeited under such circumstances subject to rules and policies to be promulgated by the department. Upon revocation of parole or mandatory supervision, the inmate loses all good conduct time previously accrued, but upon return to the department may accrue new good conduct time for subsequent time served in the department.

Tex. Code Crim. Proc. Ann. art. 42.12 (Vernon)

Sec. 12. The Board of Pardons and Paroles created by Article 4, Section 11 of the Constitution of this State, shall administer the provisions of this Act respecting determinations of which prisoners shall be paroled from an institution operated by the Department of Corrections, the conditions of parole and mandatory supervision, and may recommend the revocation of releases to mandatory supervision, paroles, and conditional pardons by the Governor. Keeping the goals of this Act in mind, the Board shall have the authority to determine the degree and intensity of supervision a prisoner released on parole or released to mandatory supervision should receive.

* * *

Sec. 15. (a) The Board is authorized to release on parole, with the approval of the Governor, any person confined in any penal or correctional institution of this State who is eligible for parole under Subsection (b) of this Section. The period of parole shall be equivalent to the maximum term for which the prisoner was sentenced less calendar time actually served on the sentence. All paroles shall issue upon order of the Board, duly adopted and approved by the Governor.

(b) A prisoner under sentence of death is not eligible for parole. If a prisoner is serving a sentence for the offenses listed in Section 3f(a)(1) of this Article (capital murder, aggravated kidnapping, aggravated rape, aggravated sexual abuse, and aggravated robbery, under Secs. 19.03, 20.04, 21.03, 21.05, and 29.03, respectively, 1974 V.T.C.A. Penal Code) or if the judgment contains an affirmative finding under Section 3f(a)(2) of this Article, (use of a deadly weapon during the commission of a felony offense or during immediate flight therefrom) he is not eligible for release on parole until his actual calendar time served, without

consideration of good conduct time, equals one-third of the maximum sentence or 20 calendar years, whichever is less, but in no event shall he be eligible for release on parole in less than two calendar years. All other prisoners shall be eligible for release on parole when their calendar time served plus good conduct time equals one-third of the maximum sentence imposed or 20 years, whichever is less.

(c) A prisoner who is not on parole, except a person under sentence of death, shall be released to mandatory supervision by order of the Board when the calendar time he has served plus any accrued good conduct time equal the maximum term to which he was sentenced. A prisoner released to mandatory supervision shall, upon release, be deemed as if released on parole. To the extent practicable, arrangements for the prisoner's proper employment, maintenance, and care shall be made prior to his release to mandatory supervision. The period of mandatory supervision shall be for a period equivalent to the maximum term for which the prisoner was sentenced less calendar time actually served on the sentence. The time served on mandatory supervision is calculated as calendar time. Every prisoner while on mandatory supervision shall remain in the legal custody of the institution from which he was released but shall be amenable to the orders of the Board.

(d) A prisoner who has not been released to mandatory supervision and has 180 calendar days or less remaining on his sentence may be released by order of the Board to mandatory supervision.

(e) Within one year after a prisoner's admittance to the penal or correctional institution and at such intervals thereafter, as it may determine, the Board shall secure and consider all pertinent information regarding each prisoner, except any under sentence of death, including the circumstances of his offense, his previous social history and criminal record, his conduct,

employment and attitude in prison, and his physical and mental health.

* * *

(g) The Board may adopt such other reasonable rules not inconsistent with law as it may deem proper or necessary with respect to the eligibility of prisoners for parole and mandatory supervision, the conduct of parole and mandatory supervision hearings, or conditions to be imposed upon parolees and persons released to mandatory supervision. . . .

* * *

Sec. 20. The Board shall have the power and duty to make rules for the conduct of persons placed on parole and of persons released to mandatory supervision.

**RULES, TEXAS BOARD OF PARDONS
AND PAROLES**

Terms and Conditions of Parole

Sec. 205.03.02.001 The following terms and conditions of parole must be agreed to and accepted by the inmate as a pre-requisite to parole. Continuation on parole is conditioned upon continuing compliance with the standard terms and conditions of parole and upon compliance with any special conditions imposed by a Parole Panel.

(a) Release and Reporting:

(1) I shall go directly to the destination approved by the Board of Pardons and Paroles.

(2) Upon arrival I shall report (*as instructed*) immediately to the Parole Officer or person whose name and address appears on my parole certificate.

(3) I shall submit a full and truthful report to my Parole Officer, on forms provided for that purpose, before the fifth (5th) day of each month or as instructed by my Parole Officer.

(4) I shall promptly and truthfully answer all inquiries directed to me and furnish all information requested of me by the Board of Pardons and Paroles or by my Parole Officer.

(5) If at any time it becomes necessary to communicate with my Parole Officer for any purpose and he is not available, I shall direct my communication to the Board of Pardons and Paroles, Room 711, Stephen F. Austin Building, Austin, Texas, 78701, telephone (area code 512) 475-4525 or 475-3363.

(b) Employment and Residence:

(1) I shall report to my place of employment; work

diligently in a lawful occupation; and support my dependents, if any, to the best of my ability.

(2) I shall secure the *written* permission of my Parole Officer before changing my residence or place of employment, and will allow my representative of the Board of Pardons and Paroles to visit my residence and place of employment at any reasonable time.

(c) Travel:

I shall secure the *written* permission of my Parole Officer before I leave the state to which I am paroled; I will secure *written* permission of my Parole Officer to travel beyond the boundaries of the counties adjoining the county to which I am paroled.

(d) Alcohol and Drugs:

(1) I shall not use alcoholic beverages or liquors to excess or in a manner injurious to my parole.

(2) I shall not go into, remain about, or frequent business establishments whose primary function is the sale or dispensing of alcoholic beverages or liquors for on-premises consumption.

(3) I shall not illegally possess, use, or traffic in any narcotic drugs, marijuana, or other controlled substances. I further agree to participate in chemical abuse treatment programs in accordance with instructions from my Parole Officer.

(4) I shall freely cooperate and voluntarily submit to medical and/or chemical tests and examinations for the purpose of determining whether or not I am using or am under the influence of alcohol, narcotic drugs, marijuana, or other controlled substance.

(e) Weapons:

I shall not own, possess, use, sell nor have under my

control any firearms or other prohibited weapon.

(f) Associates:

(1) I shall avoid association with persons of criminal background unless specifically approved by my Parole Officer in *writing*.

(2) I shall not enter into any agreement to act as an "informer" or special agent for any law enforcement agency.

(g) Legal Obligation:

I shall obey *all* municipal, county, state, and federal laws.

(h) General Provisions:

(1) I shall consult with my Parole Officer before entering marriage.

(2) I agree to abide by any special conditions of parole as stipulated in writing by the Board of Pardons and Paroles or my Parole Officer.

(3) I hereby agree to abide by all rules of parole and all laws relating to the revocation of parole, including, but not limited to, appearance at any hearings or proceedings required by the law of the jurisdiction in which I may be found or of the state of Texas. I further agree and consent that the receiving state, if I am under compact supervision, or any state wherein I may be found while on parole or under parole jurisdiction, may conduct such hearings as the Board shall deem proper or which may be required by law.

* * *

ANNUAL REPORTING STATUS

Sec. 205.03.02.005. Annual Report Status

(a) Annual report status is a parolee status which releases the parolee from the original terms and conditions of parole, releases the parolee from the direct supervision of a Parole Officer, and is conditional upon the parolees acceptance of and compliance with the Annual Report Rules.

(b) A parolee may be considered for annual report status upon the recommendation of his/her Parole Officer after having been satisfactorily under parole supervision for:

(1) A minimum of 12 months if paroled from a sentence of less than 10 years; or

(2) A minimum of 18 months if paroled from a sentence for a term of 10 or more years; or

(3) A minimum of two years if paroled from a life sentence.

(4) A minimum of three years if paroled as an habitual criminal from a life sentence (as amended effective Aug. 31, 1979).

(c) A recommendation for transfer to annual report status must be approved by the Director of the Division of Parole Supervision or his/her designated staff representative.

(d) Transfer to annual report status in no way affects the authority of a Parole Panel to recommend the revocation or the authority of the Governor to revoke a parole. The parolee remains subject to the jurisdiction of the Board and subject to its orders while on annual report status.

(e) A Parole Panel may at its discretion and without

notice set aside an order of transfer to annual report status and impose any additional rules of parole as the Parole Panel may deem to be proper.

(f) The rules for a parolee on Annual Report status are:

(1) Each year, from the date of the acceptance of this order for annual report, the parolee will submit, in writing, to the Director, Division of Parole Supervision, 711 Stephen F. Austin Building, Austin, Texas, 78701, a report showing his employment and residence. This Annual Report will be made until the term of his parole expires. Failure to submit this report each year could result in his being returned to active parole supervision, or the issuance of a pre-revocation warrant for his arrest and possible return to the Texas Department of Corrections.

(2) The parolee will in all respects conduct himself honorably, obey all federal, state and municipal laws and ordinances, work diligently at a lawful occupation, and support his dependents, if any, to the best of his ability.

(3) The parolee will not associate with persons having a criminal record and will not communicate with any inmate of a penal institution nor visit any such institution, unless requested in writing to do so by a warden or general manager of the penal institution; the original or a copy of such request shall be immediately sent to the Director, Division of Parole Supervision, 711 Stephen F. Austin Building, Austin, Texas, 78701, by the parolee.

(4) The parolee will cooperate with and abide by any written instructions given by the Board of Pardons and Paroles, or any of its duly authorized officers.

(5) The parolee will not own, possess, use, sell, nor have under his or her control any firearms or other prohibited weapons.

NON-REPORTING STATUS

Sec. 205.03.02.007. Non-reporting Status.

(a) Non-reporting status is a parolee status which releases the parolee from the terms and conditions of annual report status and is conditional upon the parolee's acceptance of and compliance with the non-reporting status rules.

(b) A parolee may be considered for non-reporting status upon the recommendation of his or her parole officer after having been on annual report status for four years; if,

(1) There has been no disciplinary action taken for that period; and,

(2) There have been no convictions for violations of the penal law, either of the felony or misdemeanor grade.

(c) A recommendation for transfer to non-reporting status must be approved by the executive director of the Board of Pardons and Paroles or his or her designated representative.

(d) Transfer to non-reporting status in no way affects the authority of the Governor to revoke a parole. The parole shall remain subject to the jurisdiction of the Board and subject to its orders while on non-reporting status.

(e) A parole panel may, at its discretion and without notice, set aside an order of transfer to non-reporting status and impose any additional rules of parole as the parole panel may deem to be proper.

(f) The rule for a parolee on non-reporting status is: The parolee will in all respects conduct himself or herself honorably, obey all federal, state and municipal laws and ordinances; work diligently at a lawful occupation; and support his or her dependents, if any, to the best of his or her ability.

GOOD TIME ALLOWANCES FOR STATE DEPARTMENTS OF CORRECTIONS (1973)

I	II	III	IV	V	VI	VII	VIII
State	Law First Passed	Rate of Good Time Allowances	Types of Good Time Allowances	Additional Good Time Allowances	Rate of Good Time Allowances	Offender Ineligible for Good Time	Effect on Parole Eligibility
Ala.	1845	6mo-1 yr 1-3 yr 3-5 yr 5-10 yr Remaining 10days/mo	Meritorious In- dustrial Pro- duction	1st yr 3days/mo 2nd, 3rd, 4th yr 4days/mo 5th+yr 5days/mo	Life Murder 1st	No effect	Credited to maximum sentence to advance discharge
Alas.	1560	6mo-1 yr 1-3 yr 3-5 yr 5-10 yr Remaining 10days/mo	Work camp, meri- torious conduct, extra duties	1st yr 3days/mo 2nd yr 5days/mo 3rd+yr 5days/mo	Life	No effect	Credited to maximum sentence for condi- tional release up to 180 days prior to expiration of sen- tence
Ariz.	1901	1st yr 60days 2nd yr 60days 3rd yr 120days 4th yr 120days 5th yr 150days Remaining 150days/yr	Trusty status	Good time allowances are doubled	All eligible	Credited to minimum sentence for 1st offenders only.	No effect
Ark.	1867	Class I Class II Class III Class IV None	None	Note	All eligible	Credited to minimum sentence to advance parole eligibility.	Credited to maximum sentence to advance parole eligibility for 2nd offenders or more

I	II	III	IV	V	VI	VII	VIII
State	Law First Passed	Rate of Good Time Allowances	Types of Good Time Allowances	Additional Good Time Allowances	Rate of Good Time Allowances	Offender Ineligible for Good Time	Effect on Parole Eligibility
Cal.	Repealed 1948						
Colo.	1876	1st yr 60days/yr 2nd yr 60days/yr 3rd yr 120days/yr 4th yr 120days/yr 5th yr 150days/yr Remaining 150days/yr	Meritorious ser- vice or out- standing service	5 days/mo	All eligible	Credited to minimum sentence to advance parole eligibility	Credited to maximum sentence to advance discharge
Conn.	1862	1-5 yr 6th yr Remaining 7days/mo	Meritorious achievement	5 days/mo Employment for 6 months	Life	Credited to minimum sentence to advance parole eligibility	Credited to minimum sentence to advance discharge
Del.	1891	1st yr 2nd yr 3rd yr 4th yr Remaining 10days/mo 10days/mo	Participation in rehabilitation progress	5 days/mo 26 days	All eligible	Credited to maximum sentence to advance parole eligibility	Credited to maximum sentence to advance conditional release

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S. 6a

S. 6b

S. 6c

I	II	III	IV	V	VI	VII	VIII
State	Law First Passed	Rate of Good Time Allowances	Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances	Offender Ineligible for Good Time	Effect on Parole Eligibility	Effect on Discharge and/or Release
D.C.	1901	1mo-1yr 1-3 yr 3-5 yr 5-10 yr 10th Remaining	5days/mo 6days/mo 7days/mo 8days/mo 10days/mo 10days/mo	Blood Donation Meritorious conduct, volunteer programs, industrial	30 days/yr Lump sum or 1st yr 3days/mo 2nd+yr 5days/mo	Life No effect	Credited to maximum sentence to advance conditional release
Fla.	1871	1st yr 2nd yr 3rd yr 4th yr 5th yr Remaining	5days/mo 5days/mo 7days/mo 10days/mo 15days/mo 15days/mo	Extra gain time Special gain time Special gain time	1-6 days/mo 1-15 days/mo 1-60 days flat reduction	All eligible No effect	Credited to maximum sentence to advance conditional release
Ga.	1856	1st yr 2nd yr 3-10 yr Remaining	1mo/yr 2mo/yr 3mo/yr 4mo/yr 10days/mo	Exemplary conduct	Set by board of corrections	Life No effect	Credited to minimum sentence to advance conditional release
Ida.	1873	6mo-1yr 1-3 yr 3-5 yr 5-10 yr Remaining	5days/mo 6days/mo 7days/mo 8days/mo 10days/mo	Incentive credits Extra meritorious our outstanding services	Restoration of forfeited good time 1-5 days/mo or Lump sum not to exceed 10 days	Life Parole eligibility	Credited to maximum sentence to advance discharge
Ind.	None						
Ill.	1863	1st yr 2nd yr 3rd yr 4th yr 5th yr 6th yr Remaining	1mo/yr 2mo/yr 3mo/yr 4mo/yr 5mo/yr 6mo/yr 6mo/yr	Institutional credits for excellent or special conduct and participation in rehabilitation programs	Advance appearance before parole board by 30, 60, or 90 days	All eligible Offender Ineligible for Good Time	Credited to minimum sentence to advance parole eligibility. Credited to 1/3 of maximum sentence to advance parole eligibility
Ind.	1861	1st yr 2nd yr 3rd yr 4th yr 5th yr Remaining	1mo/yr 2mo/yr 3mo/yr 4mo/yr 5mo/yr 5mo/yr	None	Life Habitual Murder list	Life Parole eligibility for indeterminate sentence only	Credited to minimum sentence to advance parole eligibility for indeterminate sentence only
Iowa	1873	1st yr 2nd yr 3rd yr 4th yr 5th yr Remaining	1mo/yr 2mo/yr 3mo/yr 4mo/yr 5mo/yr 6mo/yr	Trusty honor time	10 days/mo	Life No effect	Credited to maximum sentence to advance discharge
Kan.	1867	1st yr 2nd yr 3rd yr Remaining	60days/yr 120days/yr 160days/yr 110days/yr	Incentive credit	2½ days/mo	All eligible Credited to minimum sentence to advance parole eligibility	Credited to maximum sentence to advance conditional release and discharge

I	II	III	IV	V	VI	VII	VIII
State	Law First Passed	Rate of Good Time Allowances	Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances	Offender Ineligible for Good Time	Effect on Parole Eligibility	Effect on Discharge and/or Release
Ill.	1863	1st yr 2nd yr 3rd yr 4th yr 5th yr 6th yr Remaining	1mo/yr 2mo/yr 3mo/yr 4mo/yr 5mo/yr 6mo/yr 6mo/yr	Institutional credits for excellent or special conduct and participation in rehabilitation programs	Advance appearance before parole board by 30, 60, or 90 days	All eligible Offender Ineligible for Good Time	Credited to minimum sentence to advance parole eligibility. Credited to 1/3 of maximum sentence to advance parole eligibility
Ind.	1861	1st yr 2nd yr 3rd yr 4th yr 5th yr Remaining	1mo/yr 2mo/yr 3mo/yr 4mo/yr 5mo/yr 5mo/yr	None	Life Habitual Murder list	Life Parole eligibility for indeterminate sentence only	Credited to minimum sentence to advance parole eligibility for indeterminate sentence only
Iowa	1873	1st yr 2nd yr 3rd yr 4th yr 5th yr Remaining	1mo/yr 2mo/yr 3mo/yr 4mo/yr 5mo/yr 6mo/yr	Trusty honor time	10 days/mo	Life No effect	Credited to maximum sentence to advance discharge
Kan.	1867	1st yr 2nd yr 3rd yr Remaining	60days/yr 120days/yr 160days/yr 110days/yr	Incentive credit	2½ days/mo	All eligible Credited to minimum sentence to advance parole eligibility	Credited to maximum sentence to advance conditional release and discharge

S. 6d

I	II	III	IV	V	VI	VII	VIII
State	Law First Passed	Rate of Good Time Allowances	Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances	Offender Ineligible for Good Time	Effect on Parole Eligibility	Effect on Discharge and/or Release
Ky.	1876	1-10 days/mo	None		Life	No effect	Credited to maximum sentence to advance discharge
La.	1862	25 days/no flat	None		Life	No effect	Credited to maximum sentence to advance discharge
Nie.	1858	7 days/no flat	Meritorious conduct, special job assignment	2 days/mo	All eligible	Credited to minimum sentence to advance parole eligibility	Credited to maximum sentence to advance conditional release
Md.	1916	5 days/no flat	Special duties vocational and/or educational participation	5 days/mo	All eligible	Credited on life sentence to advance parole eligibility	Credited to maximum sentence to advance conditional release
Mass.	1857	4mo-1 yr 1-2 yr 2-3 yr 3-4 yr Remaining	Prison camp Blood Donation	2½ days/mo 5 days 10days/mo 12½days/mo	Life Murder 1st Sex Offenders convicted for 2nd offense while con- fined	Additional good time allowances only credited to minimum sentence to advance parole eligibility	Credited to maximum sentence to advance conditional release

S. 6e

I	II	III	IV	V	VI	VII	VIII
State	Law First Passed	Rate of Good Time Allowances	Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances	Offender Ineligible for Good Time	Effect on Parole Eligibility	Effect on Discharge and/or Release
Nich.	1857	1-2 yr 3-4 yr 5-6 yr 7-9 yr 10-14 yr 15-19 yr Remaining	Trusty, meritorious conduct	½ regular good time allowances	Life for Murder 1st Degree	Credited to minimum sentence to advance parole eligibility	Credited to maximum sentence to advance conditional release
Winn.	1867	1mo-1 yr 1-2 yr 2-3 yr Remaining	5days/mo 7days/mo 9days/mo 10days/mo		Life	Credited to maximum sentence to advance parole eligibility	Credited to maximum sentence to advance conditional release
Miss.	1892	1st yr 2nd yr 3rd yr 4th yr 5th yr 6th yr 7th yr 8th yr 9th yr 10th yr Remaining	3days/mo 4days/mo 5days/mo 6days/mo 7days/mo 8days/mo 9days/mo 10days/mo 11days/mo 12days/mo 13days/mo 14days/mo 15days/mo	Extra meritorious conduct Overtime or Sunday work Blood Donation	Increase allowances Equivalent allowances 10 days	All eligible No effect	Credited to maximum sentence to advance discharge

S. 6f

I	II	III	IV	V	VI	VII	VIII
State	Law First Passed	Rate of Good Time Allowances	Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances	Offender Ineligible for Good Time	Effect on Parole Eligibility	Effect on Discharge and/or Release
No.	1879	Maximum sentence reduced by 1/4 by parole board	Incentive time, meritorious service	5 days/mo to 10days/mo	Life	No effect	Credited to maximum sentence to advance discharge
Mont.	1877	10 days/mo inside walls 13 days/mo outside walls 15 days/no outside walls	Blood Donation Meritorious conduct, school attendance, rehabilitation programs	10 days 13 days/mo	All eligible	Credited to maximum sentence to advance parole eligibility	Credited to maximum sentence to advance discharge
Nebr.	1875	1st yr 2mo 2nd yr 2mo 3rd yr 3yo 4th yr 4yo Remaining 4mo/yr	Meritorious conduct or exceptional performance	1-5days/mo	Life	Credited to minimum sentence to advance parole eligibility	Credited to maximum sentence to advance mandatory release.
N.H.	1867	90 days/yr flat	Blood Donation, Meritorious conduct	5 days	All eligible	Credited to minimum sentence to advance parole eligibility	Credited to maximum sentence to advance discharge
Nevada	1887	1-2 yr 2mo/yr 3-4 yr 4mo/yr 5th yr 5mo/yr Remaining 5mo/yr	Blood Donation, Program and work participation	Determined by state board of parole committee	All eligible	Credited to minimum sentence to advance parole eligibility	Credited to maximum sentence to advance discharge

S. 6g

I	II	III	IV	V	VI	VII	VIII
State	Law First Passed	Rate of Good Time Allowances	Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances	Offender Ineligible for Good Time	Effect on Parole Eligibility	Effect on Discharge and/or Release
N.J.	1868	1st yr 7days/mo 2-6 yr 8days/mo 7-11 yr 10days/mo 12-16 yr 11days/mo 17-21 yr 12days/mo 22-24 yr 13days/mo 25-29 yr 15days/mo Remaining 16days/mo	Productive occupation Honor camp, farm camp	5 days work/1 day	Sex Offender	Credited to maximum and minimum sentence to advance parole eligibility	Credited to maximum sentence to advance discharge
N.Y.	1889	1st yr 1mo/yr 2nd yr 2mo/yr 3rd yr 3mo/yr 4th yr 4mo/yr 5th yr 5mo/yr 6th yr 6mo/yr Remaining 6mo/yr	Meritorious service and conduct Honor farm Blood Donation Exceptional meritorious service or conduct Industrial work	10 days/mo 12 days/mo 10 days Lump sum not to exceed one year 10 days/mo	Life No effect	No effect	Credited to maximum sentence to advance discharge
N.Y.	1817	Rate determined by good time allowance committee not to exceed 1/3 of the maximum sentence on an indeterminate sentence	Meritorious conduct, extra work	Rate determined by commissioner of corrections	Life No effect	No effect	Credited to maximum sentence to advance conditional release

S. 6h

I State	II Law First Passed	III Rate of Good Time Allowances	IV Types of Additional Good Time Allowances	V Rate of Additional Good Time Allowances	VI Offender Ineligible for Good Time	VII Effect on Parole Eligibility	VIII Effect on Discharge and/or Release
N.C.	1874	Rate determined by commissioner of corrections	Meritorious con- duct, extra work by commissioner of corrections	Rate determined by commissioner of corrections	Life	No effect	Credited to maximum sentence to advance discharge and to minimum sentence to advance conditional release or discharge
N.Dak.	1881	1-2 yr 3-4 yr 5-6 yr 7-10 yr Remaining	60days/yr 75days/yr 90days/yr 105days/yr 120days/yr	Meritorious con- duct Good work re- cord and conduct served	60days/yr 16 2/3 of time Sunday or holi- day work	Life	Credited to maximum sentence to advance discharge
Ohio	1856	1st yr 2nd yr 3rd yr 4th yr 5th yr 6th yr Remaining	5days/mo 6days/no 8day/mo 9days/no 10days/no 11days/no 11days/mo	None	None	Life Habitual Murder 1st	Credited to minimum sentence to advance parole eligibility
Okla.	1905	1-2 yr 3-4 yr Remaining	2mo/yr 3mo/yr 5mo/yr	Work Blood Donation	6 days work/2days 20 days	All eligible	No effect
							Credited to maximum sentence to advance discharge

S. 6i

I State	II Law First Passed	III Rate of Good Time Allowances	IV Types of Additional Good Time Allowances	V Rate of Additional Good Time Allowances	VI Offender Ineligible for Good Time	VII Effect on Parole Eligibility	VIII Effect on Discharge and/or Release
Ore.	1864	6mo-1yr Remaining	5days/no 15days/mo	Meritorious con- duct and work in industry	1st yr 15 days work/1 day 2-5 yr 7 days work/1 day Remaining 6 days work/ 1 day	Life	No effect
							Credited to maximum sentence to advance discharge
Penn.	Repealed 1965			Agriculture and work camp	1st yr 10 days work/1 day Remaining 6 days work/ 1 day		
R.I.	1877	1st yr 2nd yr 3rd yr 4th yr Remaining	1day/no 2days/no 3days/no 4days/no 5days/mo	Blood Donation Work in Industry	10 days 2 days/no	Life	Time for blood donations only credited to parole eligi- bility
S.C.	1914	15 days/no flat	Extra work	1 day/week	Indeterminate 60 days/yr	No effect	Credited to maximum sentence to advance discharge
							Credited to maximum sentence to advance discharge

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I	II	III	IV	V	VI	VII	VIII
State	Law First Passed	Rate of Good Time Allowances	Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances	Offender Ineligible for Good Time	Effect on Parole Eligibility	Effect on Discharge and/or Release
S.Dak.	1881	1-2 yr 3rd yr 4-10 yr Remaining	None 2mo/yr 3mo/yr 4mo/yr 6mo/yr	None	Life	Credited to minimum sentence of indeterminate sentence and maximum of determinate sentence to advance parole eligibility	Credited to maximum sentence to advance discharge
Tenn.	1856	1st yr 2nd yr 3-10 yr Remaining	Honor time 2mo/yr 3mo/yr 4mo/yr	30 days/mo	All eligible	Credited to minimum sentence to advance parole eligibility	Credited to maximum sentence to advance discharge
Texas	1881	Class I Class II Class III	20days/mo 10days/no None	Trusty Blood Donation	30 days 30 days	All eligible	Credited to maximum sentence to advance parole eligibility
Utah Rescinded 1957							
Vt.	1867	5 days/mo flat	Meritorious work conduct, special services	5 days/mo	All eligible	Credited to minimum sentence to advance parole eligibility	Credited to maximum sentence to advance discharge

S. 6k

I	II	III	IV	V	VI	VII	VIII
State	Law First Passed	Rate of Good Time Allowances	Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances	Offender Ineligible for Good Time	Effect on Parole Eligibility	Effect on Discharge and/or Release
Va.	1886	10 days for every 20 days served	Vocational or educational training	1 day/mo	Life	Only allowance for blood donations and extraordinary services are credited to advance parole eligibility	Credited to maximum sentence to advance discharge
			Blood Donations	Lump sum to be determined by state board of parole			
Wash.	1868	Good time credits fixed by Board of Prison Terms and Paroles not to exceed 1/3 of sentence	Parole Board may reduce minimum		Criminally Insane Sexual Psychopath	Credited to minimum sentence to advance parole eligibility	No effect
W.Va.	1868	1 yr 1-3 yrs 3-5 yrs 5-10 yrs Remaining	5days/mo 6days/mo 7days/mo 8days/mo 10days/mo	9½ days/mo	Life	No effect	Credited to maximum sentence to advance discharge
Wisc.	1860	1st yr/1mo 2nd yr/2mo 3rd yr/3mo 4th yr/4mo 5th yr/5mo Remaining	Diligent labor and/or study	5 days/mo	Life	No effect	Credited to maximum sentence to advance mandatory conditional release

I	II	III	IV	V	VI	VII	VIII
State	Law First Passed	Rate of Good Time Allowances	Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances	Offender Ineligible for Good Time	Effect on Parole Eligibility	Effect on Discharge and/or Release
Xyo.	1893	30 days/yr flat time	Special good time	Determined by Parole Board	Life	Credited to maximum sentence to advance parole eligibility	Credited to maximum sentence to advance discharge
Guam	Unknown	None	None	All eligible	Credited to maximum sentence to advance parole eligibility	No effect	

Federal	1867	6mo-1yr 5days/mo 1-3 yrs 6days/mo 3-5 yrs 7days/mo 5-10 yrs 8days/mo Remaining 10days/mo	Camp good time, Work release Good time, Community Treatment Center Industrial Good time, Meritorious good time, special award good time; Good time earned at other state institutions: Military, state, D.C.	1st yr 3days/mo 2nd and Remaining 5days/mo	All eligible	No effect	Credited to maximum sentence to advance conditional release
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GOOD TIME ALLOWANCES FOR STATE DEPARTMENTS OF CORRECTIONS (1979)

I	II	III	IV	V	VI	VII	VIII
State	Law First Passed	Rate of Good Time Allowances	Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances	Offender Ineligible for Good Time	Effect on Parole Eligibility	Effect on Discharge and/or Release
Alab	1843	6 mo-1 yr--8 days/mo 1-3 yrs--10 days/mo 3-5 yrs--11 days/mo 5-10 yrs--13 days/mo remaining--15 days/mo	Meritorious Conduct Industrial-ness	1 day for each day served while in incentive good time status	Life w/o Parole	None	Credited to maximum sentence to advance discharge
Ales	1960	6 mo-1 yr--5 days/mo 1-3 yrs--6 days/mo 3-5 yrs--7 days/mo 5-10 yrs--8 days/mo remaining--10 days/mo	Meritorious Conduct	Up to 5 days/mo	Habitual Murder 1st Sexual Drug	None	Credited to maximum sentence to advance discharge
Ariz	1901	1-2 yrs--60 days/yr 3-4 yrs--120 days/yr 5 yrs--150 days/yr remaining--150 days/yr	None	Not applicable	Sexual Drug	None	Credited to minimum sentence to advance parole eligibility
Ark	1867	Class I--30 days/mo Class II--20 days/mo Class III--8 days/mo Class IV--None	None	Not Applicable	Life	Credited to minimum sentence to advance parole eligibility	Credited to maximum sentence to advance discharge
Cal	1977	1/3 time taken off sentence upon entering institution	None	Not Applicable	Escape Status	Credited to minimum and maximum sentence to advance parole	Credited to minimum sentence to advance discharge
Colo	1876	Good time--30 days/mo Earned time--15 days every six months	Blood donations Meritorious Conduct	5 days/mo			

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I	II	III	IV	V	VI	VII	VIII
State	Law First Passed	Rate of Good Time Allowances	Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances	Offender Ineligible for Good Time	Effect on Parole Eligibility	Effect on Dis- charge and/ or Release
Conn	1862	1-5 yrs--5 days/mo 6 yrs and remaining-- 7 1/4 days/mo	Meritorious Conduct	5 days/mo	All Eligible	Credited to mini- mum sentence to advance parole eligibility	Credited to maxi- mum sentence to advance discharge
Del	1891	5 days/mo	Meritorious Conduct	5 days/mo	Life Habitual Murder 1st	Credited to maxi- mum sentence to advance parole eligibility	Credited to maxi- mum sentence to advance discharge
D. C.	1901	1 mo-1 yr--5 days/mo 1-3 yrs--6 days/mo 3-5 yrs--7 days/mo 5-10 yrs--8 days/mo 10 yrs and remaining-- 10 days/mo	Volunteered Psychological or Medical Ex- periments Meritorious Conduct	3 days/mo	Life	None	Credited to maxi- mum sentence to advance discharge
Fla	1871	1-2 yrs--3 days/mo 3-4 yrs--6 days/mo 5 yrs and remaining-- 9 days/mo	Work Gain Time Extra Gain Time Compensatory Gain Time	Up to 30 days/mo Up to 6 days/mo Up to 6 days/mo	Those with Mandatory Minimum Sen- tences	None	Credited to maxi- mum sentence to advance discharge
Ga	1856	Habitual Offenders-- 1 day for every 2 served	None	Not Applicable	Life	None	Credited to maxi- mum sentence to advance discharge
Non-habitual-- 1 day for every 1 served							
Ha	No Law						

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I	II	III	IV	V	VI	VII	VIII
State	Law First Passed	Rate of Good Time Allowances	Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances	Offender Ineligible for Good Time	Effect on Parole Eligibility	Effect on Dis- charge and/ or Release
Idaho	1873	3 mos/yr	Meritorious Conduct	Up to 5 days/mo	Life	None	Credited to maxi- mum sentence to advance discharge
Ill	1863	1 yr--1 mo/yr 2 yrs--2 mo/yr 3 yrs--3 mo/yr 4 yrs--4 mo/yr 5 yrs--5 mo/yr 6 yrs and remaining-- 6 mo/yr	Meritorious Conduct Compensatory Credit	Up to 90 days/yr 7 1/2 days/mo	Life Habitual Sexual	Credited to mini- mum sentence to advance parole eligibility	Credited to maxi- mum sentence to advance discharge
Ind	1861	Class I--30 days/mo Class II--20 days/mo Class III--none	None	Not Applicable	Life	Credited to mini- mum and maximum sentence to ad- vance parole eligibility	Credited to mini- mum sentence to advance discharge
Iowa	1878	1 yr--1 mo/yr 2 yrs--2 mo/yr 3 yrs--3 mo/yr 4 yrs--4 mo/yr 5 yrs--5 mo/yr remaining--6 mo/yr	Honor Time	10 days/mo	Life Murder 1st	None	Credited to maxi- mum sentence to advance discharge
Kan	1867	1 yr--2 mo/yr 2 yrs--4 mo/yr 3 yrs and remaining-- 6 mo/yr	Meritorious Conduct	30 days per incident	Life Murder 1st	Credited to mini- mum sentence to advance parole eligibility	Credited to maxi- mum sentence to advance discharge
Ky	1876	10 days/mo	Meritorious Conduct	Up to 5 days/mo	Life Habitual	None	Credited to maxi- mum sentence to advance discharge

I	II	III	IV	V	VI	VII	VIII
State	Law First Passed	Rate of Good Time Allowances	Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances	Offender Ineligible for Good Time	Effect on Parole Eligibility	Effect on Dis- charge and/ or Release
La.	1842	15 days/mo	None	Not Applicable	Habitual	None	Credited to maxi- mum sentence to advance discharge
Nd.	1916	5 days/mo	Industrial Credit	5 days/mo	All Eligible	None	Credited to maxi- mum sentence to advance discharge
Mass.	1857	4 mo--1 yr--2½ days/mo 1-2 yrs--5 days/mo 2-3 yrs--7½ days/mo 3-4 yrs--10 days/mo remaining--12½ days/mo	Blood Donations	Less than 1 yr-- 5 days/donation Over 1 yr--10 days/donation	Sexual	Credited to mini- mum sentence to advance parole eligibility	Credited to maxi- mum sentence to advance discharge
Mich.	1857	1-2 yrs--5 days/mo 3-4 yrs--6 days/mo 5-6 yrs--7 days/mo 7-9 yrs--9 days/mo 10-14 yrs--10 days/mo 15-19 yrs--12 days/mo remaining--15 days/mo	Meritorious Conduct Satisfactory Completion of Work, Education, Activity Program Prison Camp	7½ days/mo	Life Habitual Murder 1st	Credited to mini- mum sentence to advance parole eligibility	Credited to maxi- mum sentence to advance discharge
Minn.	1867	1 mo--1 yr--5 days/mo 1-2 yrs--7 days/mo 2-3 yrs--9 days/mo remaining--10 days/mo	None	Not Applicable	All Eligible	None	Credited to maxi- mum sentence to advance discharge
Miss.	1892	Class I--30 days/mo Class II--20 days/mo Class III--8 days/mo Class IV--none	Executive Order	Governor	All Eligible	Credited to maxi- mum sentence to advance parole eligibility	Credited to maxi- mum sentence to advance discharge
No.	1879	None since 01/79-- Parole provided after serving 2/3 of the sentence	None	Not Applicable	Life Murder 1st	None	Credited to maxi- mum sentence to advance parole eligibility
Mont.	1877	Up to 20 days/mo In- side Walls Up to 25 days/mo Out- side Walls	None	Not Applicable	All Eligible	Credited to mini- mum sentence to advance parole eligibility	Credited to maxi- mum sentence to advance discharge
Nebr.	1873	1-2 yrs--2 mo/yr 3 yrs--3 mo/yr 4 yrs and remaining-- 4 mo/yr	Faithful Performance	5 days/mo	Life	Credited to mini- mum sentence to advance parole eligibility	Credited to maxi- mum sentence to advance discharge
N. H.	1867	90 days/yr	Meritorious Conduct	5 days/mo	Weapons Aggravation	Credited to mini- mum sentence to advance parole eligibility	Credited to maxi- mum and minimum sentence to ad- vance discharge

S. 7c

S. 7d

I	II	III	IV	V	VI	VII	VIII
State	Law First Passed	Rate of Good Time Allowances	Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances	Offender Ineligible for Good Time	Effect on Parole Eligibility	Effect on Dis- charge and/ or Release
Nev	1887	1-2 yrs--2 mo/yr 3-4 yrs--4 mo/yr 5 yrs and remaining-- 5 mo/yr	Blood Donation Work or Edu- cational Credit	2/5 of 1 day/ donation up to 10 days/mo	All Eligible	Credited to mini- mum and maximum sentence to ad- vance parole eligibility	Credited to maxi- mum sentence to advance discharge
N.J.	1868	See Attached	Work Credits Minimum Security In- mates	1 day for each 5 worked 1st yr--3 days/mo Subsequent yrs-- 5 days/mo	Sexual Juvenile	Credited to mini- mum and maximum sentence to ad- vance parole eligibility	Credited to maxi- mum sentence to advance discharge
N.M.	1889	12 days/mo	Meritorious Conduct Work and Con- duct Perform- ance	12 days/mo Up to Classi- fication com- mittee	All Eligible	Credited to maxi- mum sentence to advance parole eligibility	Credited to maxi- mum sentence to advance parole eligibility
N.Y.	1877	Sentence reduced -by 1/3	None	Not Applicable	Life	None	Credited to maxi- mum sentence to advance discharge
N.C.	1874	150 days/yr	Meritorious Conduct Gain Time: Emergency Credits	30 or more days/yr I--3 days/mo II--5 days/mo III--8 days/mo Time given for time worked over 40 hrs/week	Pre-trial Safekeepers Split Sen- tences	Credited to mini- mum sentence to advance parole eligibility	Credited to maxi- mum sentence to advance parole eligibility

I	II	III	IV	V	VI	VII	VIII
State	Law First Passed	Rate of Good Time Allowances	Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances	Offender Ineligible for Good Time	Effect on Parole Eligibility	Effect on Dis- charge and/ or Release
N. D.	1881	1-2 yrs--6 days/mo 3-5 yrs--7 days/mo 5-10 yrs--8 days/mo remaining--10 days/mo	Available; referred to as "merely additional good time"	Same as regular allowances	All Eligible	None	Credited to maxi- mum sentence to advance parole eligibility
Ohio	1856	1 yr--5 days/mo 2 yrs--6 days/mo 3 yrs--8 days/mo 4 yrs--9 days/mo 5 yrs--10 days/mo remaining--11 days/mo	None	Not Applicable	Life	Credited to mini- mum sentence to advance parole eligibility	Credited to maxi- mum sentence to advance discharge
Oklahoma	1905	1 day for each day worked	Blood Donation	20 days per pint	Life	None	Credited to maxi- mum sentence to advance discharge
Ore	1864	6 mo-1 yr--1 day for each 6 served 1 yr and remaining-- 1 for every 2 served	Meritorious Conduct Participation in Prison Industries	2-4 yrs--1 day for every 6 served; 5 yrs and remaining--1 for every 5 served	Life	None	Credited to maxi- mum sentence to advance discharge
Penn			Agricultural Forestry Camp	1 yr-1 for every 10 served; re- maining--1 for every 6 served 1 yr--1 day for every 6 served; remaining--1 for every 4 served			

S. 7e

S. 7f

S. 7g

I	II	III	IV	V	VI	VII	VIII
State	Law First Passed	Rate of Good Time Allowances	Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances	Offender Ineligible for Good Time	Effect on Parole Eligibility	Effect on Dis- charge and/ or Release
R. I.	1877	1 yr--1 day/mo 2 yrs--2 days/mo 3 yrs--3 days/mo 4 yrs--4 days/mo remaining--5 days/mo	Blood Dona- tion Meritorious Conduct	10 days/mo Up to 3 days/mo	Life Murder 1st	Credited to maxi- mum sentence to advance parole eligibility	Credited to maxi- mum sentence to advance discharge
S. C.	1914	15 days/mo	Meritorious Conduct Earned Work	30 days every 6 months	Youthful Offenders	Credited to maxi- mum sentence to advance parole eligibility	Credited to maxi- mum sentence to advance discharge
S. D.	1881	1-2 yrs--2 mo/yr 3 yrs--3 mo/yr 4-9 yrs--4 mo/yr remaining--6 mo/yr	None	Not Applicable	Life	Credited to maxi- mum sentence to advance parole eligibility	Credited to maxi- mum sentence to advance discharge
Tenn.	1836	1 yr--1 mo/yr 2 yrs--2 mo/yr 3-10 yrs--3 mo/yr remaining--4 mo/yr	Incentive Time	Up to 5 days/mo	All Eligible	Credited to mini- mum and maximum sentence to ad- vance parole eligibility	Credited to mini- mum and maximum sentence to ad- vance discharge
Tex.	1881	State Approved Trusty 30 days/mo Class I--20 days/mo Class II--10 days/mo Class III--none	Meritorious Conduct	Up to Governor	Those on Shock Pro- bation	Credited to maxi- mum sentence to advance parole eligibility	Credited to maxi- mum sentence to advance discharge
Utah	Repealed 1957						
Vt.	1867	10 days/mo	Meritorious Conduct	Up to 5 days/mo	All Eligible	Credited to mini- mum sentence to advance parole eligibility	Credited to mini- mum sentence to advance discharge
Va.	1886	1/3 taken off sentence	Participation in Volunteered Psy- chological or Medical Experi- ments	Up to Governor	Indeterminate Sentences	Credited to mini- mum sentence to advance parole eligibility	Credited to maxi- mum sentence to advance discharge
Wash.	1888	Set by Board of Prisons Terms and Paroles not to exceed 1/3 of sentence					
W. Va.	1868	Class I--20 days/mo Class II--10 days/mo Class III--none	Meritorious Conduct	None	Not Applicable	Escape Status	Credited to mini- mum sentence to advance parole eligibility
Wisc.	1860	1 yr--1 mo/yr 2 yrs--2 mo/yr 3 yrs--3 mo/yr 4 yrs--4 mo/yr 5 yrs--5 mo/yr remaining--6 mo/yr	Diligence in Labor or Study	5 days/mo	Life	None	Credited to maxi- mum sentence to advance discharge

S. 7h

I	State	Law First Passed	Rate of Good Time Allowances	Types of Additional Good Time Allowances	Rate of Good Time Allowances	Determined by Parole Board	Offender Ineligible for Good Time	Effect on Parole Eligibility	Effect on Discharge and/or Release	VII VIII
N.Y.	1893	10 days/mo								

STATUTORY SOURCES OF S. 6 and S. 7

- Alabama: Code of Ala., Tit. 45, §253, 254, 255, 256.
- Arizona: Ariz. Rev. Stat. Ann., §31-251, 31-252, 31-253.
- Arkansas: Ark. Stats. Ann., §46-120.
- Colorado: Colo. Rev. Stat. 1963, 105-4-7.
- Connecticut: Conn. Gen. Stat. Ann., §18-7.
- Delaware: 10 Del. Code Ann., §4372.
- District of Columbia: D. C. Code Enc., §24-405.
- Florida: Fla. Stat. Ann., §944.27, 944.28, 944.29.
- Georgia: Ga. Code Ann., §77-320.
- Idaho: Idaho Code, §20-101A, 20-101B.
- Illinois: Smith-Hurd Ill. Ann. Stat. ch. 108, §45.
- Indiana: Burns' Ind. Ann. Stat., §13-116, 13-116a, 13-117.
- Iowa: Kan. Stat. Ann. 62-2241, 62-2245.
- Kentucky: Ky. Rev. Stat. Ann. 195-045.
- Louisiana: La. Stat. Ann. - Rev. Stat. 15-571.3, 15:571.4.
- Maine: 7 Me. Rev. Stat. Ann., §705, 865.
- Maryland: Md. Code Ann. Supp. Art. 27, §700.
- Massachusetts: Mass. Gen. Laws Ann. Code Ch. 127, §129.
- Michigan: Mich. Comp. Laws Ann., §800.33.
- Minnesota: Minn. Stat. Ann., §243.18.
- Mississippi: Miss. Code Ann., §7944.
- Missouri: Vernon's Ann. Mo. Stat., §216.355.
- Montana: Rev. Code Mont., §80-1905.
- Nebraska: Neb. Rev. Stat. Supp. 1971, §83-1107, 83-1108, 83-1109.
- Nevada: Nev. Rev. Stat. 209.280, 209.255.
- New Hampshire: N. H. Rev. Stat. Ann. 607:51a, b, c.
- New Jersey: N. J. Stat. Ann. 30:4-140.

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New Mexico: N. Mex. 1953 Comp. Laws. §42-1-54.

New York: McKinney Counsel. Laws of N. Y., Correctional Law
Art. 9. §230.

North Carolina: N. C. Gen. Stat. §148-13.

North Dakota: No. Dak. Cent. Code 12-54-01, 12-54-02.

Ohio: Ohio Rev. Code Ann. Supp., §2967.19.

Oklahoma: 15 Okla. Stat. Ann., §138.

Oregon: Or. Rev. Stat. 421-120.

Rhode Island: R. I. Gen. Laws 1956, §13-2-44.

South Carolina: S. C. Code 1962, §55-8, 55-11.

South Dakota: So. Dak. Compiled Laws 24-2-15

Tennessee: Tenn. Code Ann. §41-332

Texas: Vernon's Ann. Tex. Civ. St. Art. 61841. Texas C.C.P., Art. 42-12

Vermont: 1 Vt. Stat. Ann., §252.

Virginia: Va. Code 19, §53-213.

Washington: Rev. Code Wash. Ann. 9.95.070

West Virginia: W. Va. Code 28-5-27

Wisconsin: Wis Stat Ann §7-325

Federal: 18 U.S.C.A. §4161

S. 9

BOARD OF PARDONS AND PAROLES
LIFE SENTENCE
PAROLED DURING 9-75 - 8-77

No. of Cases	Offense	Average Time Credit on Sentence*	Habitual Criminal
56	Burglary	22 years, 3 months	56 or 100%
12	Forgery	22 years, 5 months	12 or 100%
59	Murder	26 years, 5 months	0
11	Narcotic	19 years, 6 months	7 or 64%
16	Rape	27 years, 0 months	0
33	Robbery	22 years, 4 months	19 or 58%
31	Theft	21 years, 5 months	31 or 100%
8	Miscellaneous	26 years, 10 months	7 or 88%
226 Total		23 years, 5 months	132 or 58%

*Slightly over one-half ($\frac{1}{2}$) of the total credit is actual calendar time served. The remaining credit is "good time" credit given by the Texas Department of Corrections for good behavior.

BOARD OF PARDONS AND PAROLES
LIFE SENTENCE
PAROLED FOR FIRST TIME 9-77 - 8-79

No. of Cases	Offense	Average Time Credit on Sentence*	Habitual Criminal
16	Burglary	22 years, 8 months	16 or 100%
4	Forgery	22 years, 0 months	4 or 100%
36	Murder	25 years, 8 months	0
5	Narcotic	21 years, 0 months	5 or 100%
11	Rape	27 years, 8 months	0
19	Robbery	22 years, 2 months	12 or 63%
5	Theft	24 years, 6 months	5 or 100%
4	Miscellaneous	28 years, 0 months	0
100 Total Cases		24 years, 2 months	42 or 42%

*Slightly over one-half ($\frac{1}{2}$) of the total credit is actual calendar time served. The remaining credit is "good time" credit given by the Texas Department of Corrections for good behavior.

No. of Cases	Offense	Avg. Flat Time on Sentence	Avg. Good Time on Sentence	Total Time on Sentence	Percent Habitual	% Non-Habitual
1	Charge not clear	10 yrs. 4 mo.	6 yrs. 0 mo.	16 yrs. 3 mo.	5%	95%
38	Homicide	15 yrs. 8 mo.	11 yrs. 5 mo.	27 yrs. 0 mo.		
10	Sexual Assault	16 yrs. 6 mo.	12 yrs. 1 mo.	28 yrs. 7 mo.		
21	Robbery	13 yrs. 10 mo.	10 yrs. 6 mo.	24 yrs. 4 mo.	62%	38%
1	Assault	11 yrs. 11 mo.	10 yrs. 6 mo.	22 yrs. 5 mo.	100%	
14	Burglary	13 yrs. 3 mo.	9 yrs. 4 mo.	22 yrs. 7 mo.	100%	
5	Larceny	13 yrs. 9 mo.	11 yrs. 0 mo.	24 yrs. 9 mo.	100%	
5	Forgery	13 yrs. 0 mo.	10 yrs. 6 mo.	23 yrs. 6 mo.	100%	
1	Fraud					
	Activity	7 yrs. 6 mo.	9 yrs. 9 mo.	20 yrs. 3 mo.	100%	
4	Drugs	12 yrs. 10 mo.	9 yrs. 2 mo.	22 yrs. 0 mo.	50%	
1	Escape	11 yrs. 0 mo.	5 yrs. 11 mo.	16 yrs. 11 mo.	100%	
101 TOTAL		14 yrs. 6 mo.	10 yrs. 8 mo.	25 yrs. 2 mo.		

S. 12

TEXAS DEPARTMENT OF CORRECTIONS
AVERAGE FLAT TIME SERVED BY INMATES
PAROLED DURING 1978*

Maximum Sentence	No. of Inmates	Percent	Average Time Actually Served		
			Yrs.	Mos.	Days
Less than 1 year	0	.00	0	0	0
Less than 2 years	11	.18	0	5	25
Less than 3 years	767	14.48	0	8	3
Less than 4 years	859	16.12	0	11	25
Less than 5 years	493	9.10	1	4	12
Less than 6 years	1,308	23.61	1	8	24
Less than 7 years	279	4.99	2	0	1
Less than 8 years	274	4.80	2	6	5
Less than 9 years	255	4.53	2	10	2
Less than 10 years	33	.57	3	0	1
10-14 years	659	11.65	3	6	6
15-19 years	213	3.69	5	1	9
20-29 years	193	3.32	6	8	13
30-39 years	54	.99	8	10	21
40-49 years	18	.30	10	7	17
50 years and Over	17	.30	13	8	20
Life	79	1.34	15	3	6
TOTAL	5,512	100.00	2	4	3

Data Not Available 3

*Time served includes flat time, good time, etc.

S. 12a

TEXAS DEPARTMENT OF CORRECTIONS
AVERAGE TOTAL TIME SERVED
BY INMATES PAROLED DURING 1978*

Maximum Sentence	No. of Inmates	Percent	Average Time Actually Served		
			Yrs.	Mos.	Days
Less than 1 year	0	.00	0	0	0
Less than 2 years	11	.18	0	10	13
Less than 3 years	767	14.48	1	2	10
Less than 4 years	859	16.12	1	9	4
Less than 5 years	493	9.10	2	5	19
Less than 6 years	1,308	23.61	3	1	7
Less than 7 years	279	4.99	3	7	8
Less than 8 years	274	4.80	4	6	25
Less than 9 years	255	4.53	5	1	22
Less than 10 years	33	.57	5	5	16
10-14 years	659	11.65	6	4	6
15-19 years	213	3.69	9	2	29
20-29 years	193	3.22	12	0	7
30-39 years	54	.99	15	10	21
40-49 years	18	.30	19	0	10
50 years and Over	17	.30	23	10	1
Life	79	1.34	26	0	28
TOTAL	5,512	100.00	4	2	11

Data Not Available 3

*Time served includes flat time, good time, etc.

S. 12b

TEXAS DEPARTMENT OF CORRECTIONS
AVERAGE TOTAL TIME SERVED BY INMATES
DISCHARGED DURING 1978*

Maximum Sentence		No. of Inmates	Percent	Average Time Actually Served		
				Yrs.	Mos.	Days
Less than 1 year	10	.27	0	5	20	
Less than 2 years	40	1.09	1	0	29	
Less than 3 years	1,172	33.26	2	0	4	
Less than 4 years	759	20.95	2	11	29	
Less than 5 years	276	7.65	4	0	1	
Less than 6 years	692	19.30	4	11	21	
Less than 7 years	140	3.80	5	11	2	
Less than 8 years	110	3.05	6	10	15	
Less than 9 years	95	2.57	7	10	25	
Less than 10 years	13	.35	9	0	0	
10-14 years	216	5.81	10	3	11	
15-19 years	37	1.01	14	9	26	
20-29 years	22	.58	19	4	5	
30-39 years	3	.08	30	0	5	
40-49 years	2	.05	27	10	4	
50 Years and Over	1	.03	50	0	11	
Life	6	.16	15	3	0	
TOTAL	3,594	100.00	4	2	2	

Data Not Available 4

*Time served includes flat time, good time, etc.

S. 12c

TEXAS DEPARTMENT OF CORRECTIONS
AVERAGE FLAT TIME SERVED BY INMATES
DISCHARGED DURING 1978*

Maximum Sentence		No. of Inmates	Percent	Average Time Actually Served		
				Yrs.	Mos.	Days
Less than 1 year	10	.27	0	3	3	
Less than 2 years	40	1.09	0	7	4	
Less than 3 years	1,172	33.26	1	1	9	
Less than 4 years	759	20.95	1	8	0	
Less than 5 years	276	7.65	2	2	22	
Less than 6 years	692	19.30	2	8	25	
Less than 7 years	140	3.80	3	2	18	
Less than 8 years	110	3.05	3	9	1	
Less than 9 years	95	2.57	4	3	25	
Less than 10 years	13	.35	5	1	3	
10-14 years	216	5.81	5	8	4	
15-19 years	37	1.01	8	5	6	
20-29 years	22	.58	10	4	27	
30-39 years	3	.08	16	1	3	
40-49 years	2	.05	22	3	20	
50 years and Over	1	.03	29	1	29	
Life	6	.16	8	3	18	
TOTAL	1	100.00	2	3	21	

Data Available 4

*Time served includes flat time, good time, etc.

TEXAS DEPARTMENT OF CORRECTIONS
AVERAGE FLAT TIME SERVED BY
INMATES DISCHARGED DURING 1977*

Maximum Sentence	No. of Inmates	Percent	Total			Cumulative Percent
			Average Time Actually Served	Yrs	Mos	
Less than 1 year	27	.84	0	3	21	.84
Less than 2 years	76	2.35	0	7	3	3.19
Less than 3 years	1,037	32.10	1	1	9	35.29
Less than 4 years	581	17.98	1	7	27	53.27
Less than 5 years	263	8.14	2	2	23	61.41
Less than 6 years	668	20.67	2	9	2	82.08
Less than 7 years	106	3.28	3	2	25	85.36
Less than 8 years	116	3.59	3	9	21	88.95
Less than 9 years	78	2.41	4	3	27	91.36
Less than 10 years	10	.31	5	1	13	91.67
10-14 years	211	6.53	5	9	6	98.20
15-19 years	32	.99	7	11	21	99.19
20-29 years	15	.46	11	4	29	99.65
30-39 years	5	.15	18	11	16	99.80
40-49 years	0	.00	0	0	0	99.80
50 and Over	0	.00	0	0	0	99.80
Life	6	.19	6	5	22	100.00
TOTAL	3,231	100.00	2	4	0	100.00

Data not available 9

*Time served excludes good time, etc.

TEXAS DEPARTMENT OF CORRECTIONS
AVERAGE TOTAL TIME SERVED BY
INMATES DISCHARGED DURING 1977*

Maximum Sentence	No. of Inmates	Percent	Total			Cumulative Percent
			Average Time Actually Served	Yrs	Mos	
Less than 1 year	27	.84	0	6	20	.84
Less than 2 years	76	2.35	1	1	0	3.19
Less than 3 years	1,037	32.10	2	0	1	35.29
Less than 4 years	581	17.98	2	11	25	53.27
Less than 5 years	263	8.14	3	11	24	61.41
Less than 6 years	668	20.67	4	11	17	82.08
Less than 7 years	106	3.28	5	9	28	85.36
Less than 8 years	116	3.59	6	11	23	88.95
Less than 9 years	78	2.41	8	0	4	91.36
Less than 10 years	10	.31	9	0	0	91.67
10-14 years	211	6.53	10	2	27	98.20
15-19 years	32	.99	14	6	7	99.19
20-29 years	15	.46	19	10	4	99.65
30-39 years	5	.15	31	9	27	99.80
40-49 years	0	.00	0	0	0	99.80
50 and Over	0	.00	0	0	0	100.00
Life	6	.19	11	1	20	100.00
TOTAL	3,231	100.00	4	2	9	100.00

Data Not Available

9

*Time served includes flat time, good time, etc.

TEXAS DEPARTMENT OF CORRECTIONS
AVERAGE FLAT TIME SERVED BY
INMATES PAROLED DURING 1977*

Maximum Sentence	No. of Inmates	Percent	Total			Cumulative Percent
			Average Time Actually Served	Yrs	Mos	
Less than 1 year	0	.00	0	0	0	.00
Less than 2 years	6	.09	0	5	0	.09
Less than 3 years	822	12.42	0	8	1	12.51
Less than 4 years	1,066	16.11	1	0	18	28.62
Less than 5 years	608	9.19	1	5	3	37.81
Less than 6 years	1,674	25.29	1	9	10	63.10
Less than 7 years	300	4.53	2	1	9	67.63
Less than 8 years	275	4.15	2	6	7	71.78
Less than 9 years	246	3.72	2	11	3	75.50
Less than 10 years	36	.54	3	2	25	76.04
10-14 years	803	12.13	3	10	16	88.17
15-19 years	255	3.85	5	0	15	92.02
20-29 years	278	4.20	6	11	0	96.22
30-39 years	59	.89	8	6	9	97.11
40-49 years	16	.24	10	7	7	97.35
50 and Over	56	.85	13	5	16	98.20
Life	119	1.80	14	1	19	100.00
TOTAL	6,619	100.00	2	7	1	100.00

Data Not Available 83

*Time served excludes good time, etc.

TEXAS DEPARTMENT OF CORRECTIONS
AVERAGE TOTAL TIME SERVED BY
INMATES PAROLED DURING 1977*

Maximum Sentence	No. of Inmates	Percent	Total			Cumulative Percent
			Average Time Actually Served	Yrs	Mos	
Less than 1 year	0	.00	0	0	0	.00
Less than 2 years	6	.09	0	8	25	.09
Less than 3 years	822	12.42	1	1	23	12.51
Less than 4 years	1,066	16.11	1	10	15	28.62
Less than 5 years	608	9.19	2	6	24	37.81
Less than 6 years	1,674	25.29	3	2	9	63.10
Less than 7 years	300	4.53	3	9	6	67.63
Less than 8 years	275	4.15	4	6	15	71.78
Less than 9 years	246	3.72	5	3	12	75.50
Less than 10 years	36	.54	5	9	13	76.04
10-14 years	803	12.13	6	11	2	88.17
15-19 years	255	3.85	9	0	20	92.02
20-29 years	278	4.20	12	4	12	96.22
30-39 years	59	.89	15	2	4	97.11
40-49 years	16	.24	18	10	6	97.35
50 and Over	56	.85	23	11	23	98.20
Life	119	1.80	24	5	12	100.00
TOTAL	6,619	100.00	4	7	9	100.00

Data not available 83

*Time served includes flat time, good time, etc.

S. 13b

S. 13c

FACTORS AFFECTING THE PAROLE DECISION IN TEXAS

PAROLE PANEL REVIEW

The Board of Pardons and Paroles desires that each inmate eligible for parole receive a personal interview from a decision maker in matters of parole. For this reason, the Board assigns each parole case to a Parole Commissioner located in Huntsville, Angleton or Palestine. The Parole Commissioner reviews all of the file material and may personally interview the inmate. He then casts a decision vote regarding the case. The Commissioner is acting as a member of a three-member Parole Panel when he carries out this function. After casting his decision vote, the file is passed on to another member of the Parole Panel. If two of the three members of the Parole Panel recommend parole, the file is then forwarded to the Governor marked "Parole Subject to Approved Release Plan", and a field investigation of the inmate is ordered. It is then up to the Governor if parole is to be granted. However, up to the time the parole certificate is signed by the inmate, the Board can withdraw its recommendation for parole. At this point we will consider the factors affecting the decision made by the Parole Panel.

Factors Affecting the Parole Decision

The decision of the Parole Panel comes after a close evaluation of the inmate to determine his or her readiness to re-enter the free world. No offender should be paroled until it can be shown that it is for the better interest of the community to have him back than to keep him in prison. Release should be effected as soon as possible but only if it is in the public interest. The parole law recognizes this when it says "a prisoner shall be placed on parole only when arrangements have been made for his proper employment or for his maintenance and when the Board believes that he is able and willing

to fulfill the obligations of a law abiding citizen."

The evaluation by the Parole Panel involves various factors, none of which taken alone is controlling, but all of which must be considered along with, and as a part of, the case as a whole.

The first step in considering an inmate for parole is to determine the readiness of the offender for parole. Some of the factors considered are discussed below.

1. Developmental and criminal history constituting the behavior pattern should give insight into the underlying cause of how criminal habit patterns and attitudes developed. Several convictions for major crimes will reduce the chances for parole. Minor offenses tend to show a pattern of maladjustment.

2. The habitual excessive use of either alcohol or narcotics may indicate serious character disorder, psychotic or psychopathic tendencies or other emotional problems. The use of either does not contribute to a successful parole adjustment.

3. The inmate's attitude toward the crime committed and the future may indicate the degree to which he has developed a sense of proportion and his ability to place the proper values upon the proper things. The ability to recognize his criminal actions as socially unacceptable, coupled with a sincere desire to improve, is viewed as a definite asset.

4. Adjustments and improvements while in prison. A clear conduct record is not, in itself, sufficient grounds for granting parole. Prison adjustment and personal improvement is an important factor. However, the traditional prison program of religion, work, education and discipline, even at its best, will not guarantee rehabilitation nor genuine readiness for parole. A prisoner may participate zealously in the religious program, he may work hard and he may

achieve in educational programs; he may keep a spotless conduct record and yet not be genuinely ready for parole. What he achieves in prison in these areas may not be indicative of real feelings, real attitudes and readiness for society. The inmate must be studied from all possible angles to determine if his good behavior is for the benefit of the Parole Board or is actually indicative of a real desire to change.

5. Sexual Deviation. Crimes involving sex are classified as situational or as an indication of character, personality or emotional disorder. The manner of commission of the offense and the psychological factors involved are carefully evaluated.

6. Intellectual and emotional status. A psychological evaluation may indicate frustration tolerance, positive or negative orientation, self concept, or paranoid drives. Imprisonment has served no purpose if it does not result in some positive change or growth of personality and the change must be motivated by more than a desire for parole. Offenders are of varying intelligence quotient levels and emotional and mental disturbances range from mild neurosis to psychosis. The mental health factor becomes a more difficult problem when cases involve borderline psychotics, psychotics in remission, psychopaths or psychoneurotics.

7. Family background and marital history are carefully evaluated and viewed as a factor in rating stability and maturity. The mere fact that an inmate's spouse has filed for, or has received, a divorce will not affect his parolability. The destitute condition of the inmate's family has no bearing on his fitness for parole or Executive Clemency and will not be considered, in itself, as grounds for release.

8. Psychological Summary — Psychological evaluation will help determine intellectual and emotional stability.

9. Point Incentive Program Ratings. In 1959, the Texas Department of Corrections initiated a Point Incentive Program to encourage inmates to engage in self-improvement activities. Ratings are made on a quarterly basis by wardens, supervisors and directors of the various self-improvement programs, and are referred to as P.I.P. Ratings. Points can be earned for work, conduct, attitude, educational, and recreational participation. Participation in Alcoholics Anonymous, choirs, bands, orchestras, etc., are included. P.I.P. Ratings have a distinct bearing upon parole selection, but are not considered alone. The Point Incentive Program is an effort to set goals for inmates, to direct their activities toward the realization of these goals, and to provide a measure of each inmate's progress. If properly executed, the Point Incentive Program should create in the inmate a desire to achieve meaningful goals, assume responsibility for self, and provide intrinsic rewards.

10. Personal habits and associates of an inmate, both in prison and out, may reflect his ability to make decisions and to place proper values upon important things.

11. Educational achievements of an inmate are rated at the time of entering prison, as well as during his period of incarceration, as positive, negative or neutral. Education in prison should serve to remove illiteracy and to increase the offender's skills to live in society without violating the law.

The Department of Corrections offers elementary and high school education through the Department's Windham School District, junior college coursework, Associate degree programs from neighboring junior colleges, and Bachelor's degrees from several universities. The Department's many vocation programs are considered among the best in the nation.

12. Age of the inmate at the time of first arrest, and the regularity of involvement in law violations thereafter, have some bearing on parole selection and parole success. In general, the younger the offender at the time of his first arrest and the greater frequency of violations, the poorer are his chances for parole adjustment. The earlier a pattern is established in life, the more ingrained it becomes and the more difficult it is to change. The peak age of reformation is generally accepted to be between the ages of twenty and thirty-five. If crime is still pursued after that age, there is usually a decreasing possibility of reform.

13. Military record is evaluated as it reflects behavior adaptability and attitude towards authority.

14. Time served on a sentence is considered, along with all other factors, to determine whether or not parole will be granted at primary eligibility, during the intermediate period or during the terminal period of the sentence. Time served, in itself, is not considered as grounds for parole.

The Primary Period is that time when legal parole eligibility is first reached, that is, when the inmate has received credit for the minimum time set by the parole law. The Board must decide whether or not the inmate is entitled to parole at reaching the minimum eligibility. During the Intermediate Period of the sentence the Board searches for improvements, maturation and stabilization factors. The Terminal Period, shortly before the end of sentence, is when the Board must decide between allowing an unconditional discharge (for those not subject to Mandatory Supervision) from prison with no post-prison supervision, or to allow him to be under parole supervision for the remainder of the sentence for his benefit and for the protection of the public. Under the provisions of the Mandatory Supervision law, all inmates whose crimes were committed on or after August 29, 1977, who are not

otherwise paroled, will be under post-prison supervision.

The second step in the parole decision is consideration of the type and seriousness of the offense, the number of prior commitments and the manner in which each offense was committed. Statistics show that certain crimes are more recidivistic than others. All offenses are considered from the standpoint of the danger to society. Every detail of the manner of commission of the offense is part of the prisoner's personality and may help to predict future conduct.

The third step is the consideration of the readiness of the community to receive the parolee. The willingness of the offender's family to take him back can be important. The attitudes of the sentencing judge, the district attorney and local law-enforcement officials are often reflections of community sentiment, and are weighed in the matter of selection for parole as required by the parole law.

After a complete analysis and study of all available information, the Parole Panel makes its decision guided by the general rules that an inmate should not be released upon parole:

1. If the assaultive potential is high
2. If there is substantial risk that he will not conform to the conditions of parole
3. If release at that time would have a substantial adverse effect on prison discipline
4. If release at that time would depreciate the seriousness of the offense or promote disrespect for the law or the system of parole
5. If there is need for continued care (physical or mental) or continued vocational training.

**TEXAS
BOARD OF PARDONS
AND PAROLES**

**THIRTY-FIRST
ANNUAL
STATISTICAL REPORT**

September 1, 1977 through August 31, 1978

**SUMMARY CHART OF PAROLE PANEL ACTIVITY
DURING THE FISCAL YEAR ENDING AUGUST 31, 1978**

A. PAROLE ACTIONS (Tables 2, 3 & 9)

1. Number of cases considered	18,922
2. Number of paroles / conditional pardons recommended to Governor ¹	5,718
3. Number of inmates paroled / conditionally pardoned	4,948

TABLE 2

**CLASSIFICATION OF PAROLE ACTIONS IN
FISCAL YEAR ENDING AUGUST 31, 1978**

Review Classification	Number Considered	Number F'D	Number Set-Off	Number Serve-All
Initial Reviews	8,554 (100%)	2,227 (26%)	4,928 (58%)	1,349 (16%)
Subsequent Reviews	8,368 (100%)	3,362 (40%)	3,235 (39%)	1,771 (21%)
TOTAL REVIEWS	16,922 (100%)	5,639 (33%)	8,163 (48%)	3,120 (19%)

**TABLE 3
PAROLE PANEL ACTIONS OVER
A 5-YEAR PERIOD**

Action	FY 74	FY 75	FY 76	FY 77	FY 78	5-Year Ave. 1974 - 1978
Cases	15,395 (100%)	15,316 (100%)	16,796 (100%)	21,754 (100%)	16,922 (100%)	17,237 (100%)
FI	5,111 (33%)	5,186 (34%)	5,629 (34%)	8,854 (41%)	5,639 (33%)	6,084 (35%)
Set-Off	7,806 (51%)	7,565 (49%)	7,882 (47%)	9,666 (44%)	8,163 (48%)	8,216 (48%)
Serve-All	2,478 (16%)	2,565 (17%)	3,285 (19%)	3,234 (15%)	3,120 (19%)	2,936 (17%)
Paroled ¹	4,237 ² (28%)	4,788 ² (31%)	4,248 ² (25%)	7,580 ² (35%)	4,948 ³ (29%)	5,160 (30%)

¹ Includes Conditional Pardons to United States Immigration Service

² Number of Parole Certificates issued

³ Number of Parolees released

TABLE 4

**REVOCATION OF PAROLES AND CONDITIONAL PARDONS
APPLICABLE TO PAROLEES RELEASED DURING THE
FISCAL YEAR ENDING AUGUST 31, 1978**

No. Paroled FY 78	No. FY 78 Paroles Revoked	Percentage Revoked
4,948	172	3.5%

TABLE 5

**REVOCATION OF PAROLES AND CONDITIONAL PARDONS
APPLICABLE TO ALL PAROLEES UNDER BOARD'S JURISDICTION
DURING ALL OR PART OF FISCAL YEAR ENDING AUGUST 31, 1978**

No. of Parolees Under Jurisdiction During FY 78	No. Paroles Revoked FY 78	Percentage Revoked
17,597	1,465	8.3%

TABLE 6

**REVOCATION OF PAROLES APPLICABLE TO ALL PAROLEES
UNDER ACTIVE FIELD SUPERVISION DURING ALL OR PART
OF FISCAL YEAR ENDING AUGUST 31, 1978**

No. of Parolees under Supervision During FY 78	No. of Field Supervised Paroles Revoked FY 78	Percentage Revoked
14,710	1,434	9.7%

TABLE 7

**REVOCATION OF PAROLES AND CONDITIONAL PARDONS
APPLICABLE TO AVERAGE NUMBER UNDER JURISDICTION
DURING THE FISCAL YEAR ENDING AUGUST 31, 1978**

Average Number Under Jurisdiction During Fiscal Year	Number Revoked	Percentage Revoked
12,809	1,465	11.4%

TABLE 8

**REVOCATION OF PAROLES APPLICABLE TO AVERAGE
NUMBER OF PAROLEES UNDER ACTIVE SUPERVISION DURING
FISCAL YEAR ENDING AUGUST 31, 1978**

Average Number Under Active Supervision During Fiscal Year	Number Revoked	Percentage Revoked
9,528	1,434	15.1%

TABLE 9

**REVOCATION OF PAROLES APPLICABLE TO AVERAGE NUMBER
OF PAROLEES NOT ACTIVELY SUPERVISED DURING THE
FISCAL YEAR ENDING AUGUST 31, 1978**

Average Number of Parolees in a Non-Supervised Status During Fiscal Year	Number Revoked	Percentage Revoked
3,281	31	0.9%

TABLE 10

**REVOCATION OF PAROLES AND CONDITIONAL PARDONS
APPLICABLE TO INMATES PAROLED DURING
THE 31-YEAR PERIOD ENDING AUGUST 31, 1978**

No. Paroled	No. Revoked	Percentage Revoked
72,781	18,071	24.8%

TABLE 11

REVOCATION DATA FOR A FIVE-YEAR PERIOD

Item	FY 1974	FY 1975	FY 1976	FY 1977	FY 1978
No. Under Jurisdiction For all or Part of Year	11,608	13,151	13,778	17,342	17,597
No. Paroles Revoked During Year	666	612	838	934	1,465
Percentage Revoked	5.7%	4.7%	6.1%	5.4%	8.3%

TABLE 21
**BREAKDOWN OF TDC RELEASES
OVER A FIVE-YEAR PERIOD**

FISCAL YEAR	TOTAL	DISCHARGED	PAROLED	RELEASED TO MANDATORY SUPERVISION
1974	7,917 (100%)	3,680 (46%)	4,237 (54%)	0 (0%)
1975	7,877 (100%)	3,089 (39%)	4,788 (61%)	0 (0%)
1976	7,702 (100%)	3,454 (45%)	4,248 (55%)	0 (0%)
1977	10,733 (100%)	3,583 (33%)	7,150 (67%)	0 (0%)
1978	8,605 (100%)	3,647 (42%)	4,948 (58%)	10 (0%)

TABLE 28

4,948 INMATES RELEASED ON PAROLE OR CONDITIONAL PARDON DURING THE FISCAL YEAR ENDING AUGUST 31, 1978 CLASSIFIED ACCORDING TO LENGTH OF SENTENCE RECEIVED AND PERCENTAGE OF TIME ACCREDITED TO SENTENCE AT TIME OF RELEASE

CRIME	LENGTH OF SENTENCE																		LIFE	TOTAL
	1 to 2	2 to 3	3 to 4	4 to 5	5 to 6	6 to 7	7 to 8	8 to 9	9 to 10	10 to 15	15 to 20	20 to 30	30 to 40	40 to 50	50 to 60	60 & UP	LIFE			
33-40 Pct.	1	137	232	99	237	45	20	18	5	54	17	35	18	8	4	0	0	0	948	
40-50 Pct.	3	151	158	70	139	33	26	22	4	119	40	44	13	4	9	0	0	0	835	
50-60 Pct.	3	153	171	95	204	50	56	51	7	132	43	42	8	0	0	0	0	0	1015	
60-70 Pct.	1	75	140	98	329	65	31	28	4	105	23	22	3	1	1	0	0	0	926	
70-80 Pct.	0	36	80	78	287	32	62	52	5	90	30	14	1	1	0	3	0	0	753	
80-90 Pct.	0	11	31	23	78	17	28	31	3	94	20	10	0	0	0	0	0	0	346	
90-100 Pct.	0	3	1	2	6	1	9	6	1	15	3	4	1	1	1	0	0	0	54	
15 Years Time Credit or More																	10	30	30	
20 Years Time Credit or More																	4	37	41	
TOTAL	8	580	813	463	1280	243	232	298	29	609	186	171	44	13	15	17	57	4948		

TABLE 30

**PRESENT STATUS OF 72,781 INMATES RELEASED FROM THE TEXAS
DEPARTMENT OF CORRECTIONS ON PAROLE OR CONDITIONAL
PARDON DURING THIRTY-ONE YEAR PERIOD ENDING AUGUST 31, 1978**

NOTE: Since the fiscal year 1947-1948, 76% of all persons released on parole or conditional pardons have completed or are completing their parole obligations satisfactorily.

YEARS	COLUMN I Released	COLUMN II Under Jurisdiction	COLUMN III Terminated	COLUMN IV Revoked
1948	747	7	644	96
1949	761	7	629	125
1950	913	23	726	164
1951	1,125	8	862	255
1952	913	20	659	234
1953	759	34	532	193
1954	837	87	542	208
1955	1,247	106	808	333
1956	1,191	61	777	253
1957	894	38	548	308
1958	1,186	49	734	403
1959	1,759	41	1,151	567
1960	2,336	70	1,448	818
1961	2,552	56	1,610	888
1962	2,548	51	1,658	839
1963	2,787	80	1,744	963
1964	3,166	80	1,923	1,163
1965	2,407	52	1,467	868
1966	2,200	67	1,435	698
1967	1,737	78	1,167	492
1968	1,921	68	1,216	637
1969	1,943	95	1,148	700
1970	2,058	111	1,284	663
1971	2,278	148	1,533	567
1972	3,375	296	2,371	706
1973	3,770	431	2,549	790
1974	4,237	543	3,013	681
1975	4,788	866	3,040	882
1976	4,248	1,107	2,417	724
1977	7,150	3,379	2,717	1,064
1978	4,948	4,493	263	172
TOTAL	72,781	12,562	42,635	17,594*

*Revocation after Reinstatement of Parole is not shown in Column IV.

EXPLANATION OF TABLE 30

Table 30 shows the present status of inmates released from the Texas Department of Corrections on Paroles or Conditional Pardons during the Thirty-One Year Period beginning September 1, 1947 and ending August 31, 1978.

A total of the number 1 Column (which gives the total number released each year) shows that 72,781 inmates were released during the entire Thirty-One Year Period. A total of the number 2 Column (which gives the number still on Active Parole out of the total released each year) shows that 12,552 inmates released over the Thirty-One Year Period are still serving satisfactorily on Parole or Conditional Pardons. Many inmates have already completed their Paroles or Conditional Pardons and have been discharged from their sentences. A total of the number 3 Column (which gives those terminated satisfactorily out of the total released each year) shows that 42,635 released during the Thirty-One Year Period have already satisfactorily terminated their Paroles or Conditional Pardons. Some Parolees have violated their Paroles or Conditional Pardons and clemency or parole has been revoked. A total of the number 4 Column (which gives those revoked out of the total released each year) shows that 17,594 over the Thirty-One Year Period have been revoked. These were revoked because of new felony convictions or for technical violations of parole.

As can be seen, Columns 2, 3 and 4 are constantly changing from year to year as parolees discharge their sentences or are revoked. For instance, there are at present only 68 parolees out of the 1,921 released in 1968 who are still on Active Parole. The others have discharged their sentences or have been revoked. On the other hand, there are 4,493 out of the 4,948 released in 1978 who are still on active Parole. This is because those released in 1968 have had 10 years to discharge their sentences while on Paroles or Conditional Pardons, while those released in 1978 have had only one year towards discharging their sentences.

STATISTICAL REPORT
 TEXAS BOARD OF PARDONS AND PAROLES
 PAROLE PANEL ACTION
 (Sept. 1, 1978 - Aug. 31, 1979)

S. 16

<u>Number of Prior Parole Reviews</u>	<u>Favorable Recommendations ("Further Investigations")</u>	<u>Unfavorable Recommendations ("Serve-Alls" and "Set-Offs")</u>	<u>Totals</u>
0	90	138	228
1	79	44	123
2	36	17	53
3	10	5	15
4	2	4	6
5	1	1	2
6	0	0	0
7	1	1	2
<u>Totals</u>	<u>219</u>	<u>210</u>	<u>429</u>

TOTAL NUMBER OF PERSONS HELD IN STATE AND FEDERAL
 INSTITUTIONS ON DECEMBER 31, 1977, AND
 NUMBER AND TYPE OF CONDITIONAL RELEASES FOR SENTENCED
 PRISONERS IN STATE AND FEDERAL INSTITUTIONS,
 BY REGION AND STATE, 1977

<u>Persons Held</u>	<u>Persons Conditionally Released</u>				
<u>Divisions, regions and States</u>	<u>12/31/77</u>	<u>Total</u>	<u>Parole</u>	<u>Pro- bation</u>	<u>Supervised mandatory release</u>
<u>United States, Total</u>	<u>291,667</u>	<u>100,230</u>	<u>86,011</u>	<u>4,174</u>	<u>8,842</u>
Federal institutions, Total	30,920	5,248	3,214	0	2,034
State institutions, Total	260,747	94,982	82,797	4,174	6,808
<u>Northeast</u>					<u>1,203</u>
Maine	666	395	336	59	0
New Hampshire	239	206	206	0	0
Vermont	416	172	156	4	12
Massachusetts	2,825	1,023	1,023	0	0
Rhode Island	686	172	131	41	0
Connecticut	2,965	1,024	1,024	0	0
New York	19,369	7,334	5,482	0	1,852
New Jersey	6,017	3,165	3,165	0	0
Pennsylvania	7,559	2,663	2,663	0	0
<u>North Central</u>	<u>59,269</u>	<u>25,216</u>	<u>22,112</u>	<u>2,008</u>	<u>764</u>
					<u>332</u>

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TOTAL NUMBER OF PERSONS HELD IN STATE AND FEDERAL
INSTITUTIONS ON DECEMBER 31, 1977, AND
NUMBER AND TYPE OF CONDITIONAL RELEASES FOR SENTENCED
PRISONERS IN STATE AND FEDERAL INSTITUTIONS,
BY REGION AND STATE, 1977
(Continued)

Persons Held Divisions, regions and States	12/31/77	Persons Conditionally Released				
		Total	Parole	Pro- bation	Supervised mandatory release	Other
Ohio	12,846	7,071	5,501	1,238	0	332
Indiana	4,633	2,411	2,048	363	0	0
Illinois	10,982	5,230	4,857	81	292	0
Michigan	13,824	4,430	4,426	4	0	0
Wisconsin	3,347	1,444	1,064	0	380	0
Minnesota	1,755	960	953	7	0	0
Iowa	2,125	585	585	0	0	0
Missouri	5,302	981	981	0	0	0
North Dakota	216	115	114	1	0	0
South Dakota	565	218	185	33	0	0
Nebraska	1,425	442	388	0	54	0
Kansas	2,249	1,329	1,010	281	38	0
<u>South</u> <u>Delaware</u>	122,031 1,021	36,196 277	30,441 208	1,360 0	3,573 69	822 0

S. 17a

TOTAL NUMBER OF PERSONS HELD IN STATE AND FEDERAL
INSTITUTIONS ON DECEMBER 31, 1977, AND
NUMBER AND TYPE OF CONDITIONAL RELEASES FOR SENTENCED
PRISONERS IN STATE AND FEDERAL INSTITUTIONS,
BY REGION AND STATE, 1977
(Continued)

Persons Held Divisions, regions and States	12/31/77	Persons Conditionally Released				
		Total	Parole	Pro- bation	Supervised mandatory release	Other
South (Cont.)						
Maryland	8,148	2,847	2,465	0	382	0
District of Columbia	2,804	1,126	856	0	270	0
Virginia	7,659	1,703	1,703	0	0	0
West Virginia	1,250	342	327	9	0	6
North Carolina	14,189	3,454	3,454	0	0	0
South Carolina	7,306	2,527	1,975	552	0	0
Georgia	11,658	2,962	2,488	49	425	0
Florida	18,713	4,748	2,760	0	1,750	238
Kentucky	3,661	2,293	1,512	318	463	0
Tennessee	5,501	1,932	1,204	19	214	495
Alabama	3,472	832	832	0	0	0
Mississippi	1,760	852	852	0	0	0
Arkansas	2,466	1,563	1,536	0	0	27
Louisiana	5,951	567	567	0	0	0

S. 17b

**TOTAL NUMBER OF PERSONS HELD IN STATE AND FEDERAL
INSTITUTIONS ON DECEMBER 31, 1977, AND
NUMBER AND TYPE OF CONDITIONAL RELEASES FOR SENTENCED
PRISONERS IN STATE AND FEDERAL INSTITUTIONS,
BY REGION AND STATE, 1977**

(Continued)

Persons Held	Divisions, regions and States	12/31/77	Persons Conditionally Released				
			Total	Parole	Probation	Supervised mandatory release	Other
<u>South (Cont.)</u>							
Oklahoma	3,955	1,410	1,000	410	0	0	0
Texas	22,517	6,761	6,702	3	0	56	56
<u>West</u>	38,705	17,416	16,058	702	607	49	49
Montana	621	328	308	19	0	1	1
Idaho	769	507	209	298	0	0	0
Wyoming	400	50	34	16	0	0	0
Colorado	2,317	1,220	1,096	124	0	0	0
New Mexico	1,613	441	441	0	0	0	0
Arizona	2,982	1,195	443	223	502	37	37
Utah	889	294	294	0	0	0	0
Nevada	1,187	387	387	0	0	0	0
Washington	4,282	1,649	1,638	0	0	0	0

S. 17c

**TOTAL NUMBER OF PERSONS HELD IN STATE AND FEDERAL
INSTITUTIONS ON DECEMBER 31, 1977, AND
NUMBER AND TYPE OF CONDITIONAL RELEASES FOR SENTENCED
PRISONERS IN STATE AND FEDERAL INSTITUTIONS,
BY REGION AND STATE, 1977**

(Continued)

Persons Held	Divisions, regions and States	12/31/77	Persons Conditionally Released			
			Total	Parole	Probation	Supervised mandatory release
West (Cont.)						
Oregon	2,935	1,286	1,286	0	0	0
California	19,623	9,776	9,776	0	0	0
Alaska	577	186	81	0	0	0
Hawaii	510	97	75	22	0	0

S. 17d

Supreme Court, U.S.
FILED

DEC 21 1979

MICHAEL A. DONAHUE, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 78-6386

WILLIAM JAMES RUMMEL,

Petitioner,

v.

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONER

SCOTT J. ATLAS

VINSON & ELKINS
2100 First City National
Bank Building
Houston, Texas 77002

Of Counsel:

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

*Court-appointed Counsel
for Petitioner*

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 78-6386

WILLIAM JAMES RUMMEL,

Petitioner,

v.

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONER

STATEMENT OF THE CASE

In its Statement of the Case, the State claims that Rummel "neglects to note that the record reflects" other charges and convictions in addition to the three convictions for which he received his life sentence. Brief for the Respondent at 3. Rummel did not discuss extraneous charges because any such charges are neither relevant here nor even part of the record. *See* text accompanying notes 6-9 *infra*.

ARGUMENT

I

RUMMEL'S AUTOMATIC LIFE SENTENCE UNDER THE TEXAS HABITUAL OFFENDER STATUTE IS CRUEL AND UNUSUAL BECAUSE IT IS GROSSLY DISPROPORTIONATE TO THE THREE PETTY PROPERTY OFFENSES UNDERLYING THE SENTENCE.

A.

The State Misreads This Court's Prior Eighth Amendment Decisions.

The State's attempt to portray this Court's prior Eighth Amendment decisions as hostile to the application of a disproportionality test to sentence length must fail because neither the old sentence length cases,¹ the

¹The State inferentially mischaracterizes three cases. First, the state implies that the majority in *O'Neil v. Vermont*, 144 U.S. 323 (1892), rejected the merits of a disproportionality objection in a 54-year sentence for the sale of liquor. Brief for the Respondent at 8 ("The majority . . . refused even to address the [Eighth Amendment] contention"). But in that case, which occurred before the Court applied the Eighth Amendment to the States through the Fourteenth Amendment, *compare id.* at 335-37 (majority opinion), *with id.* at 362-65, 370-71 (dissenting opinions); *see Brief for the Petitioner* at 16 n.5; *cf. id.* at 23 n.10 (discussing *O'Neil*), the *O'Neil* majority never even reached the disproportionality issue because the Court dismissed the case for lack of a federal question.

Second, the State infers that this Court rejected a similar claim in *Badders v. United States*, 240 U.S. 391 (1916), raised by a defendant who had received 35 years for mail fraud. Brief for Respondent at 8. But as the en banc court below noted, *Rummel v. Estelle*, 587 F.2d 651, 655 n.7 (5th Cir. 1979), *cert. granted*, ____ U.S. ___, 99 S. Ct. 2403 (1979), the defendant in *Badders* received only a 5-year sentence (5 years on each of 7 counts, to be served concurrently), and the Court in that case never considered the sentence length issue because the defendant never raised it. *See Brief for the Petitioner* at 22 n.9.

Finally, as the *Weems v. United States*, 217 U.S. 349 (1910), which ruled excessive a 15-year sentence at hard labor, the State

recent death penalty cases,² nor constitutional history³ support the State's position.

Moreover, not only has the Court never suggested use of an Eighth Amendment standard for non-death cases different from the one used in death cases,⁴ but there is no reason why the standard should change. Although the test should be applied with greater exactitude when life is at stake, that is a different question. Any standard other than those outlined in *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (discussed in Brief for the Petitioner at 24)—such as the Fifth Circuit's pre-*Rummel* test that

argues that the Court would not have reached the same result if the punishment had not included hard labor and various civil disabilities. Brief for the Respondent at 8. But as Rummel pointed out, Brief for the Petitioner at 21-22 n.9, and as more recent decisions have recognized, *see id.* at 22 n.9 (citing cases), while *Weems* rested on both the length and the inherent cruelty of the sentence, the Court indicated that either ground alone would have sufficed to invalidate the sentence.

²Rummel concedes the unique severity of the death penalty, *id.* at 61, and accepts the greater burden he must discharge in a non-capital case but rejects as unjustly insurmountable the rational basis test urged by the State, under which no sentence could ever be judged excessive, *see id.* at 66-67.

³Rummel applauds the State's attempt to demolish an argument that Rummel never raised—"that the Framers intended the Eighth Amendment to apply merely to long punishments." Brief for the Respondent at 9. Rummel has argued only that the Framers' intent is unclear, that both logic and history suggest that the Framers may have intended to incorporate the proportionality concept into the Eighth Amendment, and that they surely intended for the meaning of the moral concept inherent in the word "cruel" to evolve. Brief for the Petitioner at 20-21 n.8.

⁴*See, e.g., Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (corporal punishment case; citing death and non-death cases); *cf. Gardner v. Florida*, 430 U.S. 349, 358 (1977) (sentencing procedures in both capital and non-capital cases must meet same due process requirements).

asked whether a punishment was "so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice"⁵—lacks any objective guidelines, would allow judges to substitute their own views for those of the Legislature, and would engender the very uncertainty decried by the State, *see Brief for the Respondent* at 27-28.

B.

The State Cannot Rely on Alleged Convictions That Did Not Trigger Rummel's Life Sentence, That Were Never Proven at Trial, and That Are Not in the Record.

In its Brief opposing Rummel's Petition for Certiorari, Respondent's Brief in Opposition at 13, and again in its Brief on the merits, Brief for the Respondent at 3, 13 n.3, 14, 15 & n.4, the State claims for the first time in this case (six years after Rummel was convicted and sentenced to life imprisonment for three petty property offenses) that Rummel has other convictions in his past. Apart from the inadequacy of the State's proof,⁶ Rum-

⁵ Rogers v. United States, 304 F.2d 520, 521 (5th Cir. 1961) (cited in *Rummel* 587 F.2d at 655 (en banc opinion)). Courts in many states have employed a different formulation of the same general principle. *See e.g.*, *In re Lynch*, 503 P.2d 921, 930 (Cal. 1973) (en banc) (citing cases in 4 states).

⁶ The State's claim that the record reflects pending charges, "at least one of which resulted in a [fourth] felony conviction," Brief for the Respondent at 3, is supported by the flimsiest of "proof": (1) an arrest warrant (A.1) and a surety motion (A.2) reflecting that Rummel was then (January 30, 1973) in county jail "on other charges," including swindling by check, and (2) an undated letter, ostensibly signed by Rummel, to the court in which Rummel received his life sentence, giving "official notice of appeal" in "cause No. unknown swindling by worthless check 0/50 of which I was convicted and sentenced in your court the 10th April 1973" (A.3).

[footnote continued]

mel objects on at least three grounds to this disgraceful attempt to circumvent the rules of evidence and appellate procedure.

First—and most fundamentally—even if the State's claim were true, the additional offenses are immaterial. By mandating life sentences for those convicted of a third felony, the Texas Legislature foreclosed proof of mitigating circumstances and pleas for mercy and compassion. The State now seeks to prove enhancing circumstances allegedly justifying the harsh retribution inflicted on Rummel. But the State cannot have it both ways. If extraneous circumstances had been admissible during the sentencing stage of the trial to assist a sentencing authority with discretionary power over Rummel's punishment, surely Rummel would never have received a life sentence. But no such proof was admissible then, and it should not be now. Rummel's life sentence must stand or fall on the

Such "evidence," even if it had been introduced at trial and were somehow material, substantiates none of the State's reckless accusations of final convictions, felony or misdemeanor. *Compare Elizalde v. State*, 507 S.W.2d 749, 752 (Tex. Crim. App. 1974) (named identical to defendant's appeared on prison packet of proceedings in prior trial that had been admitted in evidence without objection; held, no proof of identity). *See also id.*; Cain v. State, 468 S.W.2d 856, 859 (Tex. Crim. App. 1971) (neither certified copies of records from prior convictions alone nor such records plus copies of the defendant's fingerprints in those cases are sufficient to proof identity); *accord*, Brief for the Respondent at 13. Moreover, since none of these documents was ever identified, authenticated, or explained at trial, they are not now before the Court. *See note 9 infra*.

The State argues that the en banc court below found as fact a fourth felony. *Id.* at 19-20. But the court below could not properly make such a finding based on facts outside the record. *See, e.g.*, Hassenflu v. Pyke, 491 F.2d 1094, 1095 (5th Cir. 1974) ("It is inappropriate . . . to base an appellate opinion on assertions dehors the record"); Garcia v. American Marine Corp., 432 F.2d 6, 8 (5th Cir. 1970) (per curiam) (affidavit attached to appellate brief could not be considered).

three offenses named in the indictment⁷ (R.79-81) and found true by the jury (R. 281) because these offenses alone triggered the sentence.

Second, the claimed convictions are irrelevant because none could have been used to enhance Rummel's sentence under the Texas habitual offender statute.⁸

Finally, the State waived whatever opportunity it might have had to prove additional offenses by not presenting evidence to the convicting court, or at least to the federal district court that denied Rummel's habeas corpus petition. The State's reliance on matters outside the record is a practice consistently condemned by this Court.⁹

⁷ Texas courts uniformly require that a prosecutor give notice in the indictment of any prior offenses that will be used to justify an enhanced penalty. *E.g.*, Hollins v. State, 571 S.W.2d 873, 875-76 (Tex. Crim. App. 1978) (discussing numerous cases) (the accused is entitled to notice of the claimed former convictions so that if possible he can show a mistake in identity, no final conviction, or some other defect).

⁸ Every offense claimed by the State fails one or more of the following four enhancement requirements: First, only felonies can be used for enhancement under the statute. *E.g.*, Clifton v. State, 156 Tex. Crim. 655, 246 S.W.2d 201, 203 (1951) (denying motion for rehearing) (prior misdemeanors cannot be used to enhance punishment for a subsequent felony conviction). Second, each conviction must have been committed after the final conviction for the preceding offense. *Accord*, Brief for the Respondent at 12. Third, a probated sentence prevents a conviction from being final for enhancement. Davis v. Estelle, 529 F.2d 437, 440 & n.7 (5th Cir. 1976) (citing cases). Finally, a conviction pursuant to a guilty plea cannot be used for enhancement if the defendant was not represented by counsel at the time of the plea. *E.g.*, *Ex. parte Martinez*, 508 S.W.2d 359, 360 (Tex. Crim. App. 1974).

⁹ See, e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-58 n.16 (1970) ("Manifestly, it [an *ex parte* statement of a witness]

[footnote continued]

Thus, the State's requested remand to the district court for an opportunity to prove those offenses, Brief for the Respondent at 32, 36, would be superfluous.

C.

The State's Argument That a Life Sentence Is Not a Life Sentence Because Rummel *May* Be Paroled Demonstrates the Futility of Relying on the Good Graces of the Parole Board and the Governor.

The State argues that Rummel's sentence is not truly a life sentence because (1) Rummel *might* get good time credit for twelve years and become eligible for parole, *see id.* at 16-17, (2) the Parole Board *might* then recommend that the Governor parole him, *id.* at 17, (3) the Governor *might* accept the Parole Board's recommendation and parole him, (4) the Board *might* place him on annual reporting status after three years on parole, *id.* at 24, (5) and the Board *might* place him on non-reporting status after another year on parole, *id.* at 25. Moreover, the State presents statistics purporting to demonstrate that parole is easily obtained and virtually guaranteed within four years, *id.* at 21,¹⁰ unless Rummel "evinces no demonstrable indicia of rehabilitation, [in which case] he may never be released," *id.* at 17.

cannot be properly considered by us in the disposition of the case"); *Hopt v. Utah*, 114 U.S. 488, 491 (1885) ("The lawfulness of the conviction and sentence of the defendant is to be determined by the formal record . . . and not by *ex parte* affidavits"); *Russell v. Southard*, 53 U.S. (12 How.) 138, 158 (1851) ("This court must affirm or reverse upon the case as it appears in the record"). *See also ABA, Project on Standards for Criminal Justice* §§ 5.9, 8.4(c) (Approved Draft 1971) (quoted in R. Stern & E. Gressman, *Supreme Court Practice* 717 (5th ed. 1978)) (reference to matters outside the appellate record is "a grave violation of ethical standards").

¹⁰ The statistics cited by the State (S.16) demonstrate no such guarantee. They show only that few people seek parole after three years and that even fewer succeed in obtaining it.

But the State's chain of argument fails because each link depends on definition on an act of grace, granted on no fixed basis and according to no ascertainable standard. By state law, good time credit "is a privilege and not a right." Tex. Rev. Civ. Stat. Ann. art. 6181-1 §4 (Vernon Supp. 1978) (S.1a). It may be forfeited by non-criminal conduct. *Id.* (violation of prison rules). Likewise, parole and the conditions imposed incidental to parole result from acts of mercy, not the operation of law. *See Brief for the Petitioner* at 33.

The State implores this Court to avoid being "unrealistic" in viewing Rummel's sentence. *Brief for the Respondent* at 21. But in Rummel's world, parole is not a "realistic" expectation. In *Greenholtz v. Inmates*, ___ U.S. ___, 99 S.Ct. 2100 (1979), the Court held that a convicted person has no constitutional right to parole, *see id.* at 2104-05 (discussed in *Brief for the Petitioner* at 33). If state officials can deny parole at whim, Texas cannot rely on Rummel's "mere hope" for parole, *id.* at 2105, as a crutch to support its position, no matter how high the average prisoner's parole possibilities.¹¹ Irrespective of the State's protests to the contrary, the outcome of this case will determine for all time whether Rummel will ever have the right to be free. Surely for federal constitutional purposes, Rummel's life sentence means life.

¹¹The governor of Texas recently highlighted the transitory character of the parole "privilege" by increasing significantly the percentage of Parole Board parole recommendations rejected by his office. *See, e.g., Baker, Board of Paroles finds Clements a tough warden, Austin American-Statesman, Sept. 23, 1979, §A, at 1, col. 1* (Texas Governor vetoed 79% of June 1979 parole recommendations and 33% since March 1979, compared to less than 5% for most previous governors).

D.

A Decision in Rummel's Favor Would Not Hamper Administration of the Habitual Offender Statute.

The State's concern that 46 habitual offenders may "flood" Texas courts with their claims, *Brief for the Respondent* at 26, is amusing if not alarming, since (1) 46 in 15 years, Table 1 (C.1 n.1), is hardly a flood, (2) 12 of these had their convictions reversed (*see C.20-21*), and (3) a large portion of the remaining 34 were probably indicted for at least one violent felony when assessed their life sentences. Since so few prisoners would qualify to seek relief under the standard Rummel argues here, the State's prediction that a decision declaring Rummel's sentence excessive would engender chaos among state officials, *Brief for the Respondent* at 27-28, exaggerates the potential problem, *see Brief for the Petitioner* at 63-65.

The "levelling" effect that the State fears from an adverse decision is minimal. Texas could still adopt a scheme imposing a relatively longer sentence than that in other jurisdictions. The State would only have to observe an outer limit beyond which it could not "experiment" without exceeding constitutional restrictions. The proportionality concept is misnamed: instead of requiring strict proportionality between crime and punishment, which would stifle state experimentation, it only prohibits gross disproportionality.

The State's mischaracterization of Rummel's position as an attack on prosecutorial discretion, *Brief for the Respondent* at 30-31, exposes the State's desperately weak position. As Rummel has often pointed out, *see, e.g., Brief for the Petitioner* at 73, Rummel questions only the Legislature's decision to give the prosecutor the power to indict him as a habitual offender and subject

him to an automatic life sentence for trivial offenses. He does not challenge the prosecutor's decision to use that power.

II

RUMMEL HAS NOT PROCEDURALLY DEFAULTED THE RIGHT TO CHALLENGE THE EXCESSIVE LENGTH OF HIS SENTENCE BY FAILING TO OBJECT ON THAT BASIS AT THE PUNISHMENT PHRASE OF HIS TRIAL.

The State argues that Rummel waived his Eighth Amendment claim by failing to raise it at the trial, Brief for the Respondent at 32-36, even though (1) the State raised this argument for the first time in the en banc court below, (2) the Eighth Amendment's application to sentence length alone was at the time of Rummel's trial and still is uncertain, (3) Rummel's objection would have been futile because Texas courts have consistently resisted such a claim, and (4) the policies underlying the procedural default doctrine do not apply here. The State's response to each of these four defenses is unsatisfactory.

First, the State claims that it did not waive the procedural default issue by failing to raise it below because the issue could not have been raised before the Court decided *Wainwright v. Sykes*, 433 U.S. 72 (1977). But *Wainwright*, which concerned a habeas corpus petitioner's right to challenge for the first time the voluntariness of a confession admitted into evidence at trial, only expanded a rule dating back to 1913. See cases cited, *id.* at 82. *Wainwright* did not make the procedural default doctrine any more or less applicable to this case.

Second, contrary to its earlier assertions, see Brief for the Respondent at 6-10, the State argues that the proportionality concept as a constitutional principle rests on many older cases, including *Weems* and the recent

death penalty cases, *id.* at 35 n.8, so that Rummel cannot claim to fall within an exception created by Texas courts for the failure to raise a constitutional claim not yet established.¹² See Brief for the Petitioner at 70. But even Respondent agrees that neither this Court nor Texas courts have ever applied the proportionality principle to sentence length alone. Brief for the Respondent at 8. To the extent that the *Weems* Court did, see Brief for the Petitioner at 21-22 n.9, the law in this area at the time of Rummel's trial in 1973 was certainly no more clear than the law of procedural default. Thus, if the "unestablished claim" exception cannot help Rummel avoid procedural default because the Eighth Amendment law was sufficiently clear in 1973, the State waived its right to raise the issue because pre-*Wainwright* law was also clear. If the exception protects Rummel, the State's argument fails on that basis.

Third, the State reasons that Rummel cannot claim futility because Texas courts had never rejected an as-applied challenge like his. But Texas courts have unanimously rejected Eighth Amendment challenges to sentence length with reasoning that forecloses such a challenge, i.e., that a sentence within statutory limits can never be excessive.¹³ Even as-applied challenges receive

¹²Even the cases cited by Respondent, Brief for the Respondent at 33, support this exception. See *Ex parte Bagley*, 509 S.W.2d 332, 334 (Tex. Crim. App. 1974) (citing approvingly to *Ex parte Casarez*, 508 S.W.2d 620 (Tex. Crim. App. 1974) (petitioner's failure to object at trial to use for enhancement of prior conviction allegedly void for lack of counsel did not waive his right to raise the issue by habeas corpus, since indigent's right to counsel had not been established at the time of petitioner's trial)).

¹³See, e.g., *Samuel v. State*, 477 S.W.2d 611, 614 (Tex. Crim. App. 1972) ("This court has frequently stated that where the punishment assessed . . . was within the limits prescribed by the

[footnote continued]

the same response.¹⁴ And both the state district (R. 35) and appellate habeas courts (R. 31) rejected Rummel's argument. *See Brief for the Petitioner at 72.*¹⁵

Finally, the State urges that the *Wainwright* Court's concern that all fact issues be decided at trial is served here because Rummel's position raises fact issues best decided initially by the trial judge. *Brief for the Respondent at 36.* But this case requires resolution of no disputed fact issues and does not implicate the defense lawyer "sandbagging" problem that the *Wainwright* Court sought to prevent. *See Wainwright*, 433 U.S. at 89.

statute the punishment is not cruel and unusual"); *Reid v. State*, 157 Tex. Crim. 65, 246 S.W.2d 197 (1952) (same); *Stroud v. State*, 145 Tex. Crim. 264, 167 S.W.2d 526 (1943) (same).

¹⁴ See *Flores v. State*, 472 S.W.2d 146, 150 (Tex. Crim. App. 1971), where the defendant argued not only that article 63 was cruel and unusual, but also that his crime (burglary) was "trivial in nature" and thus implied that it was unsuitable for enhancement. In rejecting the latter claim, the court cited to a case, *Beasley v. State*, 389 S.W.2d 299, 301 (Tex. Crim. App. 1965), *cert. denied*, 382 U.S. 990 (1966), in which the court confronted—and rejected, citing previous holdings—only a *per se* attack on article 63. Thus, the Texas state courts clearly do not distinguish between *per se* and as applied Eighth Amendment attacks on sentence length and reject both under the same rationale.

¹⁵ Contrary to the State's inference that the summary rejection of Rummel's claim might have rested on a waiver theory, *see Brief for the Respondent at 34* ("even if [the state conviction court's summary] rejection [of Rummel's Eighth Amendment claim] were construed as a decision on the merits"), the trial court explicitly ruled Rummel's sentence not disproportionate (R. 53), and the appellate court agreed with the trial court's finding (R. 31). Moreover, these opinions must have been on the merits because the State never raised the waiver issue. (*See R. 33-34*).

CONCLUSION

The judgment of the en banc court of appeals should be reversed and Rummel released from confinement.

Respectfully submitted,

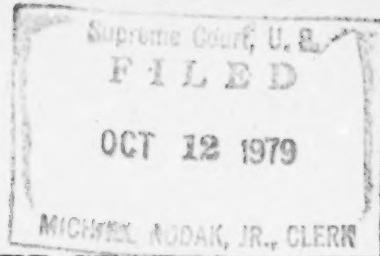
SCOTT J. ATLAS

VINSON & ELKINS
2100 First City National
Bank Building
Houston, Texas 77002

*Court-appointed Counsel
for Petitioner*

Of Counsel:

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705



NO. 78-6386

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

WILLIAM JAMES RUMMEL,

Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

* * *

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

* * *

BRIEF OF THE DISTRICT ATTORNEY
OF HARRIS COUNTY, TEXAS
AS AMICUS CURIAE

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas

LARRY P. URQUHART
Assistant District Attorney
Harris County, Texas

MICHAEL KUHN
Assistant District Attorney
Harris County, Texas
201 Fannin
Houston, Texas 77002

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INTEREST OF AMICUS CURIAE

This brief is being filed pursuant to Rule 42 of the Rules of the Supreme Court of the United States and is accompanied by written consent of both of the interested parties, William James Rummel and W. J. Estelle, Director, Texas Department of Corrections.

The Harris County District Attorney is an elected county official charged with the prosecution of state crimes. Tex. Rev. Civ. Stat., arts. 199, 326k-26. The Office of the District Attorney has secured numerous convictions under Article 63 of the Texas Penal Code of 1925 and § 12.42(d) of the Texas Penal Code of 1974. Moreover, numerous indictments under § 12.42(d) presently are being prepared for prosecution. Many of these criminal prosecutions under the Texas recidivist statute are directly affected by the opinion in *Rummel v. Estelle*, 587 F.2d 651 (5th Cir. 1978) (*en banc*).

Because this case presents fundamental questions concerning the validity and continuing vitality of the Texas recidivist statute, Amicus believes that it has a direct interest in the outcome of this case.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 78-6386

WILLIAM JAMES RUMMEL,

Petitioner

v.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

CONSENT TO FILING OF AMICUS CURIAE BRIEF

We hereby consent, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, that an Amicus Curiae Brief may be filed by the District Attorney of Harris County, Texas, in the above styled and numbered cause.

/s/
SCOTT J. ATLAS
Attorney of Record for Petitioner

/s/
DOUGLAS M. BECKER
Attorney for Respondent

NO. 78-6386

IN THE
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* * *

BRIEF OF THE DISTRICT ATTORNEY
OF HARRIS COUNTY, TEXAS
AS AMICUS CURIAE

TO THE HONORABLE JUSTICES OF SAID
COURT:

Comes Now, John B. Holmes, Jr., District Attorney
for Harris County, Texas, Amicus Curiae herein, and
files this his brief in response to the brief of the
Petitioner, William James Rummel.

QUESTIONS PRESENTED

Whether the imposition of a mandatory life sentence
under the Texas recidivist statute is so disproportionate
to the underlying offenses for which the Petitioner was
convicted as to constitute cruel and unusual
punishment.

SUMMARY OF ARGUMENT

The life sentence imposed in the instant case did not offend the disproportionate punishment corollary of the cruel and unusual punishment clause of the Eighth Amendment. Cf., *Coker v. Georgia*, 97 S.Ct. 2861, 2865 (1977). The court should exercise judicial restraint and affirm the judgment of the United States Court of Appeals for the Fifth Circuit *en banc*.

STATEMENT OF CASE AND FACTS

In light of the statement of facts recited by the Texas Court of Criminal Appeals in *Rummel v. State*, 509 S.W.2d 630 (Tex. Crim. App. 1974), and the United States Court of Appeals, *Rummel v. Estelle*, 587 F.2d 651 (5th Cir. 1978) (*en banc*), neither a statement of the case nor a statement of facts is necessary.

ARGUMENTS AND AUTHORITIES

I. Evolution of the Texas Recidivist Statute

A. Legislative Enactments

In 1856 the Texas Legislature enacted a statute pertaining to habitual offenders. Paschal, I *Laws of Texas* 472 (1873). Article 2464 of the Texas Penal Code of 1856 provided:

“Any person who shall have been three times convicted of a felony less than capital, shall, on such third conviction, be imprisoned to hard labor for life, in the penitentiary.”

This provision was preserved verbatim in subsequent codifications of the Texas Penal Code. Texas Penal Code of 1879, art. 820; Texas Penal Code of 1895, art. 1016; Texas Penal Code of 1911, art. 1620.

In 1925 and 1974 the Texas legislature modified the former recidivist statute:

“Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.” Texas Penal Code (1925), art. 63.

* * * *

“If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life.” Texas Penal Code (1974), §12.42(d).

Section 12.42(d) of the 1974 Penal Code retains the substance of the former provisions and codifies the judicial construction in cases such as *Rogers v. State*, 325 S.W.2d 697 (Tex. Crim. App. 1959). In essence, a conviction under §12.42(d) requires two prior felony convictions. The second previous felony conviction must be committed after the first previous felony conviction became final; likewise, the felony offense which forms the basis of the recidivist indictment must be committed after the second previous felony conviction became final. E.g., *Porter v. State*, 566 S.W.2d 621 (Tex. Crim. App. 1978); *Spiers v. State*, 552 S.W.2d 851 (Tex. Crim. App. 1977); *Hickman v. State*, 548 S.W.2d 736 (Tex. Crim. App. 1977).

B. Judicial Review

The Texas Court of Criminal Appeals consistently has rejected challenges to the constitutionality of the recidivist statute and, thus, has approved the imposition of life prison terms as punishment for crimes comparable to those which form the basis of the indictment filed in the instant case. In *Passmore v. State*,

544 S.W.2d 399 (Tex. Crim. App. 1976), the court rejected a claim that the recidivist statute offends the constitutional guarantee against double jeopardy. *Accord, Schultz v. State*, 510 S.W.2d 940 (Tex. Crim. App. 1974). Similarly, the court has rejected summarily Eighth Amendment challenges to the constitutionality of the recidivist statutes. E.g., *Shaver v. State*, 496 S.W.2d 604 (Tex. Crim. App. 1974) (shoplifting); *Rogers v. State*, 486 S.W.2d 786 (Tex. Crim. App. 1972) (burglary); *Flores v. State*, 472 S.W.2d 146 (Tex. Crim. App. 1971) (attempted burglary); *Vandall v. State*, 438 S.W.2d 578 (Tex. Crim. App. 1969) (passing a forged instrument); *Young v. State*, 341 S.W.2d 911 (Tex. Crim. App. 1960) (felony theft); *Ex Parte Reyes*, 383 S.W.2d 804 (Tex. Crim. App. 1964) (passing a forged instrument); *Mackie v. State*, 367 S.W.2d 697 (Tex. Crim. App. 1963) (felony theft); *Redding v. State*, 265 S.W.2d 811 (Tex. Crim. App. 1954) (felony theft).

The Supreme Court of the United States, recognizing that its role is not that of a legislator or rule-maker, exercised judicial restraint and rejected an attack on the constitutionality of the Texas recidivist statutes. *Spencer v. Texas*, 385 U.S. 554, (1967):

"Tolerance for a spectrum of state procedures dealing with a common problem of law enforcement is especially appropriate here. The rate of recidivism is acknowledged to be high, a wide variety of methods of dealing with the problem exists, and experimentation is in progress. The common-law procedure for applying recidivist statutes, used by Texas in the cases before us, which require allegations and proof of past convictions in the current trial, is of course, the simplest and best-known procedure . . . To say that the two-stage jury trial as in the English-Connecticut style is probably the fairest, as some commentators and courts have suggested, and with which we

might well agree were the matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment . . . To take such a step would be quite beyond the pale of this court's proper function in our federal system." 385 U.S. 554, 566-68 (1967).

In a more recent review of the Texas recidivist statute, Judge Thornberry reiterated the importance of judicial restraint:

"Perhaps, if I were a prosecutor, I would not have sought an indictment charging the defendant with a habitual count; if I were a state lawmaker, I would vote to amend the statute so it would not be applied as it has been done here; or if I were governor of the State of Texas, I would consider the petitioner a prime candidate for clemency. But I do not hold these offices and my decision must be guided by the Eighth Amendment rather than my feelings of compassion and justice . . . While it is well-settled that the Eighth Amendment circumscribes legislative powers to punish crime, the balance to be struck when a court enters this traditionally legislative field is not easily determined. The judicial function lies somewhere between abdication of fundamental responsibility in the guise of judicial restraint and the insertion of judicial conceptions of wisdom and propriety." *Rummel v. Estelle*, 568 F.2d 1193, 1201-02 (5th Cir. 1978) (Thornberry, J., dissenting), rev'd *en banc* 587 F.2d 651 (5th Cir. 1978).

Accordingly, the Texas recidivist statute has been reviewed by a variety of forums. E.g., *Spencer v. Texas*,

385 U.S. 554 (1967); *Rummel v. Estelle*, 587 F.2d 651 (5th Cir. 1978) (*en banc*), cert. granted 47 U.S.L.W. 3760 (U.S. May 22, 1970); *McCardell v. State*, 557 S.W.2d 289 (Tex. Crim. App. 1977). In each case, the courts exercised judicial restraint and rejected Eighth Amendment challenges to the constitutionality of the Texas recidivist statute. See, Comment, "A Closer Look at Habitual Criminal Statutes," 16 Am. Crim. L. Rev. 275, 282-92 (1979); Note, "Recidivist Laws Under the Eighth Amendment," Toledo L. Rev. 606, 609-17 (1979).

C. Recent Review of Long Prison Terms in Other Jurisdictions

Drawing on the concurring opinions of the capital punishment case *Furman v. Georgia*, 408 U.S. 238 (1972), the Fourth Circuit developed a four-prong test for disproportionate sentences. *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973); see, Note, "Recidivist Laws Under the Eighth Amendment," in 10 Toledo L. Rev. 606, 621-23 (1979). In determining that a West Virginia statute violated the Eighth Amendment, the court considered cumulatively (1) the nature of the offense, (2) the legislative purpose that underlies the punishment, (3) the punishment that the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. The Fourth Circuit, however, has failed to apply the four-prong test of *Hart v. Coiner* with regularity and consistency; instead, the court has narrowed the application of *Hart* in recent decisions. Cf., *Rummel v. Estelle*, 587 F.2d 651, 656 n.8 (5th Cir. 1978); but see, *Davis v. Davis*, 601 F.2d 153 (4th Cir. 1979). Moreover, the Fifth Circuit and the Second Circuit have refused an intact application of the four-prong *Hart v. Coiner* analysis. E.g., *Rummel v. Estelle*, 587 F.2d 651, 660-61 (5th Cir. 1978); *Carmona v. Ward*, 576 F.2d 405, 409-10 (2nd Cir. 1978). Both circuits recognized the legislative prerogative and held that the legislature's decision concerning the

appropriate penal sanction did not transgress the Eighth Amendment.

Amicus submits, therefore, that the constitutional limitation on non-capital criminal sanctions was accurately expressed in *Rummel v. Estelle*:

"[A] punishment could be cruel and unusual if it is so greatly disproportionate to the offense committed as to be *completely arbitrary and shocking to the sense of justice*." 587 F.2d 651, 655 (5th Cir. 1978). (Emphasis added)

See also, *Davis v. Davis*, 601 F.2d 153 (4th Cir. 1979) (Widener, J., dissenting), citing *Yeager v. Estelle*, 489 F.2d 276 (5th Cir. 1973), cert. denied 416 U.S. 908 (1974).

II. The Texas Recidivist Statute Does Not Offend the Eighth Amendment.

A. The Eighth Amendment: Its Evolving Meaning

The history of the Eighth Amendment is well-known. *Furman v. Georgia*, 408 U.S. 238, 316-28 (1972) (Marshall, J., concurring). Nevertheless, jurists have recognized the immense complexities inherent in a determination of the exact scope of the cruel and unusual punishment clause of the Eighth Amendment. Compare, *Trop v. Dulles*, 356 U.S. 86, 99 (1958), with *Wilkinson v. Utah*, 99 U.S. 130, 135-36 (1878). Punishment by torture and lingering death clearly is prohibited by the cruel and unusual punishment doctrine; however, the "mere extinguishment of human life" and long prison terms are not violative per se of constitutional guarantees. E.g., *In Re Kemmler*, 136 U.S. 436, 447 (1890); *Wilkinson v. Utah*, *supra*. While capital punishment and long prison terms generally are permissible under the Eighth Amendment, such punishments can be imposed in a manner that is offensive to human dignity or contrary to "evolving

standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Weems v. United States*, 217 U.S. 349, 379(1910).

The Supreme Court of the United States recently has held that capital punishment is not unconstitutional per se. *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242(1976); *Gregg v. Georgia*, 428 U.S. 153 (1976). Finding that death penalty statutes are not unconstitutional per se, the Supreme Court reviewed state legislation and determined that the punishment was not disproportionate in relation to the crime for which it was imposed:

"But we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

See also, *Jurek v. Texas*, 428 U.S. 262, 265-67 (1976); *Proffitt v. Florida*, 428 U.S. 242, 245-46 (1976). The disproportionate corollary of the Eighth Amendment was subsequently applied in *Coker v. Georgia*, 97 S.Ct. 2861, 2865-67 (1977):

"In sustaining the imposition of the death penalty in *Gregg*, however, the court firmly embraced the holdings and dicta from prior cases [citations omitted] to the effect that the Eighth Amendment bans not only those punishments that are *barbaric* but also those that are *excessive* in relation to the crime committed. Under *Gregg*, the punishment is excessive and unconstitutional if it(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to

the severity of the crime. A punishment might fail the test on either ground."

Coker v. Georgia, therefore, establishes a two-prong test of disproportionality under the Eighth Amendment: the punishment of death must be neither grossly out of proportion with the severity of the criminal behavior nor purposeless in its imposition of pain and suffering.

B. Application of *Coker v. Georgia*

1. *Coker v. Georgia* is not applicable to non-capital felonies.

Coker v. Georgia, 97 S.Ct. 2861 (1977), applied the disproportionate corollary of the Eighth Amendment and held that capital punishment is "an excessive penalty for the rapist who, as such, does not take human life." 97 S.Ct. 2861, 2869. The majority opinion suggests that the two-prong test for disproportionate punishments may be limited to death penalty cases which are unique in their severity and irrevocability. *Coker v. Georgia*, 97 S.Ct. 2861, 2869(1977), citing *Gregg v. Georgia*, 428 U.S. 153, 187 (1976); see also, *Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring); 354 U.S. 1, 54-56 (1957) (Frankfurter, J., concurring). The instant case involves life imprisonment, a revocable punishment significantly less severe than death. Eligibility for parole under Article 42.12(15) of the Texas Code of Criminal Procedure strongly detracts from the severity of the punishment. Appellate review, as well as habeas corpus and the powers of clemency and pardon, guarantee constant reviewability of the punishment and procedures which underlie the Petitioner's conviction.

Accordingly, Amicus respectfully submits that the two-prong test of *Coker v. Georgia* should not be applied in non-capital felony cases that are scrutinized solely because of the length of the prison term.

2. The Texas recidivist statute does not violate the disproportionate punishment corollary of the Eighth Amendment.

a. Contribution to acceptable goals of punishment

If *Coker v. Georgia, supra*, requires a determination of whether life imprisonment with eligibility for parole is "excessive" in relation to the crime committed, Amicus submits that the Texas statutes satisfy the two-prong test of *Coker v. Georgia, supra*. Initially, *Coker* requires a determination of whether a punishment contributes to acceptable goals of punishment -- deterrence, rehabilitation, retribution, and protection of society.

(1) rehabilitation

The Texas Court of Criminal Appeals recognizes that the recidivist statute is "reformatory" in nature. *E.g., Rogers v. State*, 333 S.W.2d 383, 385 (Tex. Crim. App. 1960); *Ellis v. State*, 115 S.W.2d 660, 663 (Tex. Crim. App. 1938). After being convicted of his first two felony offenses, the recidivist is encouraged by society to rehabilitate. The recidivist is given the option to either pursue a law-abiding lifestyle in conformity with Texas penal laws or, upon being convicted of a felony for the third time, to return to prison for a term of years calculated under Article 42.12 of the Texas Code of Criminal Procedure and Article 6184L of the Texas Revised Civil Statutes.

(2) deterrence

The Texas Recidivist Statute contributes to the deterrence of crime. The statute deters the specific offender from future acts of misconduct, and it deters others from beginning the life of a career criminal. When the offender is convicted of his second felony offense, the mandatory life prison term is a legitimate

legislative response to encourage rehabilitation. Moreover, if the felony offender is unable to rehabilitate or reform after being previously convicted of two other felony offenses, the mandatory life prison term with eligibility for parole is a reasonable legislative response to prevent future misconduct by the habitual felony offender.

(3) protection of society

The Texas Recidivist Statute promotes a third acceptable goal of punishment, the protection of society. "Constitutionality and Construction of Statute Enhancing Penalty for Second or Subsequent Offense," 58 ALR 20, 25-26 (1929); *see also*, 82 ALR 345, 349 (1933); 132 ALR 91 (1941); 132 ALR 673 (1942). The legal commentary analyzes recidivist statutes and concludes that there is a reasonable basis for the additional punishment because "the subsequent crimes tend to show that the criminal tendency had become imbedded in the accused, and the protection of society demanded a more severe punishment for him than the one who was the first offender." 58 ALR 20, 26 (1929). An Iowa court rejected an Eighth Amendment challenge and held that

"[I]t is not for us to invade the province of the Legislature, and to say that the punishment is out of proportion to the nature of the particular offense. More and more we are coming to the notion that punishment should be made to fit the criminal rather than the crime. Surely, when one by his conduct has indicated that he is a recidivist, there is no reason for saying that society may not protect itself from future ravages. It is neither cruel nor unusual to say that a habitual criminal shall receive a punishment based upon his established proclivities to commit crime." *State v. Dowden*, 115 N.W. 211, 212 (Io. 1908).

A California court rejected similar Eighth Amendment contentions and affirmed the punishment assessed in a case similar to that at bar:

"[T]he legislature may require the courts to take into consideration the persistence of the defendant in his criminal course . . . It is the first and highest duty of government to secure its citizens the enjoyment of their lives and property against the unlawful aggression of the criminal class, who, if unrestrained, would despoil the law-abiding of both life and property. When a person has proven himself immune from the ordinary modes of punishment, then it becomes the duty of government to seek some other mode to curb his criminal propensities that he might not continue to future inflict himself on law-abiding members of society. This we think may be done even to the extent of depriving him permanently of his liberty." *In Re Rosencrantz*, 271 P. 902, 904-05 (Calif. 1928).

The California statute provided for life imprisonment without the possibility of parole after the fourth felony conviction. In *Rosencrantz* the offender was convicted of a series of crimes against property similar to those presented in the case at bar: fraudulently making and uttering a check upon a bank without sufficient funds to meet same; fraudulently issuing a fictitious check; fraudulently drawing a check; and, making and passing a fictitious instrument. The punishment was not disproportionate to the crimes committed in light of the societal interest in protecting itself against repeated felonious assaults against property.

(4) retribution

Retribution is a fourth acceptable goal of punishment:

"Retribution in punishment is an extreme expression of the community's disapproval of crime, and if this retribution is not given recognition then the disapproval may also disappear. A community which is too ready to forgive the wrongdoer may end by condoning the crime." A. Goodhart, *English Law and Moral Law* 92-93 (1953).

Accordingly, the principle of retribution is an acceptable goal of punishment which must not be ignored. Society is entitled to express its aversion to habitual criminal activity by attaching a more severe punishment to same.

(5) conclusion

It is clear that the Texas Recidivist Statute contributes to each of the four acceptable goals of punishment: rehabilitation, deterrence, protection of society, and retribution. Therefore, the imposition of a life sentence, with the possibility of parole, does not represent a "needless imposition of pain and suffering," and the Texas scheme of punishment does not violate the disproportionate corollary of the Eighth Amendment. *E.g., Carmona v. Ward*, 576 F.2d 405 (2nd Cir. 1978), cert. denied 99 S.Ct. 874 (1979).

b. Proportionality of the punishment

The second prong of *Coker* involves a determination of whether the punishment of life imprisonment, with the opportunity for parole is "grossly out of proportion to the severity of the crime." In *Coker* the court found death to be "grossly disproportionate" to the severity of the crime of rape. To reach the conclusion, the court noted the unique aspects of capital punishment -- severity and irrevocability. 97 S.Ct. 2861, 2869 (1977). The instant case involves life imprisonment, a revocable punishment. Furthermore, eligibility for parole under

Article 42.12(15) of the Texas Code of Criminal Procedure and good time under Article 6184L of the Texas Revised Civil Statutes strongly detracts from the severity of the punishment. See, *Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring); 354 U.S. 1, 54-56 (1957) (Frankfurter, J., concurring). The Texas recidivist statute, even if not particularly tailored to the precise gravity of the underlying offense, is a legitimate legislative effort to make the punishment fit the criminal. When a person has proven himself immune to the ordinary modes of punishment and continues a course of criminal misconduct, the government is duty-bound to secure its law-abiding citizens the protection of their lives and property by developing a method to curb recidivist criminal propensities. E.g., *In Re Rosencrantz, supra*; *State v. Dowden, supra*.

The Petitioner's argument is erroneously predicated on the claim that he was imprisoned for life for theft of amounts aggregating approximately \$230.00. The Texas recidivist statute, however, primarily focuses upon the inability of an individual to reform, not the extent of the individual Complainant's suffering. See, *Carmona v. Ward*, 576 F.2d 405, 411 n.9 (2nd Cir. 1978); *Ellis v. State*, 115 S.W.2d 660, 663 (Tex. Crim. App. 1938). Amicus respectfully submits that life imprisonment, with the eligibility for parole, is not "excessive" in relation to the criminal behavior being punished.

It is significant that ten other states provide mandatory life sentences for a recidivist -- West Virginia, Washington, Colorado, New Mexico, Wyoming, Delaware, Illinois, Nevada, South Carolina, and Tennessee. Note, "Recidivist Laws Under the Eighth Amendment," 10 *Toledo Law Review* 606, 610 (1979). Moreover, several states provide for life sentences without the possibility of parole -- Alabama, Arizona, Delaware, Georgia, and Tennessee. *Rummel v.*

Estelle, 587 F.2d 651, 657 n.15 (5th Cir. 1978). Under these circumstances, Texas law is not "grossly disproportionate" in comparison with similar recidivist legislation in sister jurisdictions. The eligibility for parole and good time strongly militate against any disproportionate attributes of the mandatory life imprisonment. See, *Carmona v. Ward*, 576 F.2d 705 (2nd Cir. 1978); *Brown v. Wainwright*, 574 F.2d 200, 201 (5th Cir. 1978); *Rodriguez v. Estelle*, 536 F.2d 1096, 1097 (5th Cir. 1976).

c. The Texas scheme of punishment

(1) the allegations

An indictment alleging an offense punishable under the habitual offender statute requires the allegation of two prior felonies both of which must have become final before the commission of the third felony offense underlying the prosecution. E.g., *Porter v. State*, 566 S.W.2d 621 (Tex. Crim. App. 1978); *Spiers v. State*, 552 S.W.2d 851 (Tex. Crim. App. 1977); *Hickman v. State*, 548 S.W.2d 736 (Tex. Crim. App. 1977). The indictment does not include the offender's entire criminal history, but only alleges the three offenses necessary under §12.42(d) of the Texas Penal Code. Petitioner's entire criminal history -- while material to the prosecutor's exercise of discretion when electing to go forward with a habitual case -- is immaterial to the State's pleading under §12.42(d).

Accordingly, when the reviewing court considers the constitutionality of the punishment imposed, courts may look beyond the indictment. The Amicus Brief filed by the Bexar County District Attorney in the United States Court of Appeals indicates that the indictment filed in Petitioner's case did not fully reflect the extent of Petitioner's criminal history. Brief of the criminal District Attorney of Bexar County, Texas, as Amicus Curiae at 2-3 n.1, *Rummel v. Estelle*, 587 F.2d 651 (5th

Cir. 1978) (*en banc*).

(2) the punishment

The Texas scheme of punishment should not be viewed in a vacuum but, rather, should be viewed in its entirety. The recidivist, sentenced to life imprisonment, is eligible for parole in less than twenty years. Tex. Code Crim. Proc., art. 42.12(15); Tex. Rev. Civ. Stat., art. 6184L. Because the Texas scheme of punishment provides for the possible rehabilitation of the recidivist defendant through eligibility for parole, the scheme militates against any cruel and unusual aspects of life imprisonment.

To assume any impropriety or discrimination by the Texas Board of Pardons and Parole is improper. See, *Craft v. Texas Board of Pardons and Parole*, 550 F.2d 1054 (5th Cir. 1977). Amicus respectfully submits that the court should consider the entire scheme of punishment when considering whether punishment pursuant to the recidivist statute was constitutional as applied to the Petitioner in the instant case. *Carmona v. Ward*, 576 F.2d 405, 413-14 (2nd Cir. 1978); *Rummel v. Estelle*, 587 F.2d 651, 657 (5th Cir. 1978), citing *Rodriguez v. Estelle*, 536 F.2d 1096, 1097 (5th Cir. 1976). The possibility of parole promotes the "reformatory" goals of punishment, and the State of Texas, through its laws pertaining to pardon and parole, does not abandon the hope of rehabilitating the recidivist offender. See, *Carmona v. Ward*, *supra*.

C. Conclusion

Amicus respectfully submits that the Texas recidivist statute is neither facially defective nor unconstitutional as applied. A fundamental principle of constitutional law is that statutes are presumed valid, and the Petitioner attacking the constitutionality of a legislative enactment has the burden to show otherwise. E.g., *Ex*

Parte Granviel, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978); cf., *Weems v. United States*, 30 S.Ct. 544, 553-54 (1910). In the instant case, Petitioner has failed to discharge his burden with respect to the constitutionality of the recidivist statute by showing that the statute either is "grossly out of proportion to the severity of the crime" or fails to make a "measurable contribution to acceptable goals of punishment." *Coker v. Georgia*, 97 S.Ct. 2861, 2865 (1977).

Petitioner primarily relies on *Weems v. United States*, *supra*. In *Weems* the Supreme Court declared unconstitutional a sentence under the Philippine Code of Criminal Procedure which allowed the imposition of a fifteen-year sentence to hard and painful labor in chains for falsifying a public and official document. Article 2464 of the Texas Penal Code of 1856 provided that the habitual offender would be "imprisoned to hard labor for life, in the penitentiary." The language was modified in the Texas Penal Code of 1925 to eliminate the "hard labor" aspect of the recidivist statute. Amicus respectfully submits that the cruel and unusual aspect of the punishment in *Weems* pertained to the penalties of *cadena temporal*, not the mere length of the sentence imposed.

Petitioner also relies on *Coker v. Georgia*, 433 U.S. 584 (1977), which adopted the disproportionate corollary of the Eighth Amendment's cruel and unusual punishment clause. In *Coker* the Supreme Court cites *Weems v. United States*, *supra*; *Trop v. Dulles*, 356 U.S. 86 (1958); *Robinson v. California*, 370 U.S. 660 (1962); and *Furman v. Georgia*, 408 U.S. 238 (1972). The authorities do not pertain to the length of prison terms per se but, rather, concentrated on the manner of the imposition of the sentence. For example, *Furman v. Georgia*, *supra*, pertained to the imposition of capital punishment in an arbitrary and capricious manner. *Robinson v. California*, *supra*, involved a ninety-day

sentence imposed for the mere addiction to drugs. *Compare, Powell v. Texas*, 392 U.S. 514 (1968). In *Robinson* the court concluded that the mere addiction did not constitute any criminal offense and that punishment therefor constituted a violation of the cruel and unusual punishment clause of the Eighth Amendment. In *Trop v. Dulles*, *supra*, a majority of the court was unable to agree on whether the loss of citizenship constituted cruel and unusual punishment. Justice Brennan concurred in the result and concluded that the statute which authorized deprivation of citizenship exceed Congress' legislative powers. Therefore, the cases cited as authority for the disproportionate corollary in *Coker v. Georgia*, *supra*, are not dispositive of the instant case which pertains to the mere length of Petitioner's prison term.

The cruel and unusual punishment clause of the Eighth Amendment has never been applied by this court to invalidate a state statute merely because the Court feels that the prison term is too severe or greater than one that it would have imposed. *E.g., Davis v. Davis*, 585 F.2d 1226, 1229 (4th Cir. 1978), rev'd *en banc* 601 F.2d 153 (4th Cir. 1979). Amicus respectfully submits that judicial restraint should be exercised in cases pertaining to the mere length of prison terms authorized by state statute. A prison term should not be reversed unless it is "completely arbitrary and shocking to the sense of justice." *Rummel v. Estelle*, 587 F.2d 651, 655 (5th Cir. 1978) (*en banc*). Petitioner's application for habeas corpus relief, therefore, was properly denied by the United States District Court and the United States Court of Appeals.

III. The Policy of Judicial Restraint Avoids the Imposition of Unwarranted Burdens on the State Criminal Justice System

A. Judicial Restraint

By deciding that the Texas Recidivist Statute was

constitutional as applied in the instant case, the United States Court of Appeals refused to substitute its view of acceptable felony offenses for enhancement purposes and refused to require the State to redefine felony offenses which it considers "relatively trivial." A contrary opinion would fail to present adequate guidelines for subsequent judicial determination:

"Surely the principle of the decision cannot be the dollar sign, and the court gives no other indication where the line is to be drawn. Whatever sociological analysis I might apply to this case, I cannot avoid the conclusion that with this decision we stand on the brink of the slippery slope in its most classic sense." *Rummel v. Estelle*, 568 F.2d 1193, 1202 (5th Cir. 1978) (Thornberry, J., dissenting), rev'd *en banc* 587 F.2d 651 (5th Cir. 1978).

* * * *

"The questions arising are innumerable; but to me, the majority leaves them unanswered to be determined on a case-by-case basis." *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973) (Boreman, J., dissenting).

To adopt Petitioner's position, the felony offender is incapable of knowing which felony offenses can be used for enhancement purposes. This effect detracts from the deterrent aspect of the statutory scheme for punishing habitual offenders.

The Supreme Court of the United States consistently has recognized that prominence is given to the power of the Legislature to define crimes and affix punishment, for they are in the superior position to detect societal maladies and to develop a scheme designed to ameliorate the problem. See, *Coker v. Georgia*, 97 S.Ct. 2861, 2877-78 (1977) (Burger, C.J. dissenting); *Weems v.*

United States, 30 S.Ct. 544, 551-54 (1910). Accordingly, federal courts should not interfere with the legislative scheme of punishment for habitual offenders.

B. The Unwarranted Burden

To adopt Petitioner's position would impose on Texas courts the obligation to review all past recidivist convictions on a case-by-case basis to determine the presence of any cruel and unusual aspects of the punishment. Such a ruling would constitute an unwarranted intrusion which would interfere with the State's administration of criminal justice. *See, Hart v. Coiner*, 483 F.2d 136, 149 (4th Cir. 1973) (Boreman, J., dissenting).

IV. Conclusion

Amicus respectfully submits that Petitioner's contention represents a threat to the constitutional power of state legislatures to define crimes and affix punishments, and to the well-founded principle of judicial restraint. Additionally, Petitioner's contention threatens the efficient administration of the criminal justice system by imposing the obligation of case-by-case review of all past habitual convictions.

Application of the Texas Recidivist Statute in the instant case did not violate the disproportionate corollary of the cruel and unusual punishment provision of the Eighth Amendment. Amicus respectfully submits that the Texas recidivist statute does not offend the two-prong test applied in *Coker v. Georgia*, 97 S.Ct. 2861 (1977), and that the four-prong test of *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), is not constitutionally required. *Hart* should not be applied to invalidate the Texas recidivist statute and the decisions of the United States District Court and the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas

LARRY P. URQUHART
Assistant District Attorney
Harris County, Texas

MICHAEL KUHN
Assistant District Attorney
Harris County, Texas
201 Fannin
Houston, Texas 77002

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been mailed to the following address:

Scott J. Atlas
Counsel for Petitioner
2100 First City National Bank Bldg.
Houston, Texas 77002

Douglas M. Becker
Counsel for Respondent
P.O. Box 12548
Austin, Texas 78711

MICHAEL KUHN

-22-

Assistant District Attorney
Harris County, Texas
201 Fannin
Houston, Texas 77002

Date: 10-1-79

ca

OCT 15 1979

RONALD RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6386

WILLIAM JAMES RUMMEL,
Petitioner,

vs.

W. J. ESTELLE, JR., DIRECTOR, TEXAS
DEPARTMENT OF CORRECTIONS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF THE CRIMINAL DISTRICT ATTORNEY
OF BEXAR COUNTY, TEXAS, AS AMICUS CURIAE**

BILL M. WHITE
Criminal District Attorney
Bexar County, Texas

KEITH W. BURRIS
Assistant Criminal District Attorney
Bexar County Courthouse
San Antonio, Texas 78205

Amicus Curiae for Respondent

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6386

WILLIAM JAMES RUMMEL,
Petitioner,

vs.

W. J. ESTELLE, JR., DIRECTOR, TEXAS
DEPARTMENT OF CORRECTIONS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF THE CRIMINAL DISTRICT ATTORNEY
OF BEXAR COUNTY, TEXAS, AS AMICUS CURIAE**

INTEREST OF AMICUS

By written consent of petitioner and respondent, the Criminal District Attorney of Bexar County, Texas has filed this brief as amicus curiae. The Bexar County Criminal District Attorney is particularly interested in this case because he and his assistants were the prosecuting state officials in *State v. Rummel*, cause number 73-CR-214, in which petitioner, William James Rummel, was assessed a "life" sentence in accordance with Article 63 of the Texas

Penal Code (1925), the then designated habitual offender statute.¹

The Criminal District Attorney of Bexar County, Texas is further particularly interested in this case because he and his assistants have been the prosecuting officials in numerous cases in which life sentences were imposed under the terms of Article 63 of the Texas Penal Code (1925) and its successor provision, Section 12.42, Texas Penal Code (1974), both provisions being known as "The Habitual Offender Statute." A decision finding that the Habitual Offender Statute was inappropriately applied to Petitioner in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution would jeopardize the now final convictions in many cases prosecuted by this amicus.

ARGUMENT AND AUTHORITIES

Recidivist statutes and habitual offender statutes are promulgated by legislatures for the legitimate purpose and goal of deterring and punishing that particular class of criminals who persistently flaunt the law and efforts directed at their reformation. See *Spencer v. Texas*, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967). Punishments

1. An assistant district attorney for Bexar County presented evidence to the Bexar County Grand Jury resulting in the indictment of William James Rummel on January 31, 1973, for the offense of Theft over Fifty Dollars (\$50.00) by False Pretext. The indictment also contained two enhancement paragraphs alleging that Rummel had been previously convicted of two other felony offenses, namely: Credit Card Fraud in 1964 and Passing a Forged Instrument in 1969. A copy of the indictment is included in the Amicus Appendix to this brief at p. A-1. An assistant district attorney for Bexar County, Texas presented evidence at Rummel's trial which resulted in a guilty verdict by a jury and a finding of "true" to the two enhancement paragraphs, mandating a "life sentence". A copy of the judgment and sentence is included in the Amicus Appendix to this brief at p. A-55.

under these statutes are based upon the individual's continuing pattern of criminal conduct, not merely upon the last offense he commits.

Petitioner, William James Rummel, has maintained a continuing course of conduct in derogation of Texas penal laws, thus placing himself within that class of criminals for which the Texas legislature felt compelled to adopt more severe measures for the deterrence of crime and protection of its citizens.²

2. Petitioner has neglected to advise the Court of his entire criminal history. A more accurate list of his criminal record, exclusive of arrests, is set out below:

1. Convicted October 20, 1959 of Misdemeanor Theft in cause no. 68554.
2. Convicted October 20, 1959 of Unlawful Possession of Alcoholic Beverages, cause no. 68553.
3. Convicted January 21, 1960 of Unlawfully Carrying a Deadly Weapon in County Court No. 1, Bexar County, Texas.
4. Convicted May 17, 1960 of Burglary in cause No. 3357 in the 81st District Court of Karnes County, Texas. Granted three years probation.
5. Convicted March 6, 1964 of Swindling by Check in cause no. 144938 in County Court, Bexar County, Texas.
6. Convicted March 6, 1964 of Swindling by Check in cause no. 144864 in County Court, Bexar County, Texas.
7. Convicted December 16, 1964 of Presentation of Credit Card With Intent to Defraud in cause no. 64306 in the 144th District Court, Bexar County, Texas.
8. Violated parole on July 21, 1966. Returned to the Texas Dept. of Corrections on August 25, 1966.
9. Convicted February 21, 1968 of Aggravated Assault on a Female in cause no. 157124 in County Court No. 3, Bexar County, Texas.
10. Convicted April 23, 1968 of Swindling by Check in cause no. 167599 in County Court, Bexar County, Texas.
11. Convicted March 11, 1969 of Forgery in cause No. 68-977, in the 144th District Court, Bexar County, Texas.
12. Convicted April 10, 1973 of Swindling by Check Over \$50 in cause no. 72-2721 in the 187th District Court, Bexar County, Texas.
13. Convicted April 10, 1973 of Theft of Property Over the Value of \$50 (Habitual) in cause No. 73-CR-214 in the 187th District Court of Bexar County, Texas.

See Amicus Appendix at pp. A-9 through A-56.

Contrary to petitioner's suggestion, he did not receive a life sentence under Texas law for theft of property totaling \$230.11. Rather, his punishment resulted from the fact of his third felony conviction. No one, including petitioner, receives a "life" sentence in Texas merely for the offense of theft. Petitioner was found guilty of felony theft by a jury which subsequently heard competent evidence at the punishment phase of the trial that petitioner had been twice previously convicted of felony offenses. Based upon that evidence, the jury returned a verdict of "life" in the Texas Department of Corrections.

The use of prior convictions is a rational means of setting punishment for habitual offenders that has been approved by the courts throughout the history of this Nation. Tracing that history, this Court in *Graham v. West Virginia*, 224 U.S. 616, 32 S.Ct. 583, 56 L.Ed. 917 (1912), stated:

"The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted. Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796 and in Massachusetts in 1804; and there have been numerous acts of similar import in many states. This legislation has uniformly been sustained in the state courts (*Ross's Case*, 2 Pick. 165, 170; *Plumbly v. Com.* 2 Met. 413, 415; *Com. v. Richardson*, 175 Mass. 202, 205, 55 N.E. 988; *Rand v. Com.* 9 Gratt. 740, 741; *King v. Lynn*, 90 Va. 345, 347, 18 S.E. 439; *People v. Stanley*, 47 Cal. 114, 17 Am. Rep. 401; *People v. Coleman*, 145 Cal. 609, 79 Pac. 283, *Ingalls v. State*, 47 Md. 485, *State v. Aus-*

tin, 113 Mo. 538, 21 S.W. 31), and it has been held by this Court not to be repugnant to the Federal Constitution. *Moore v. Missouri*, 159 U.S. 673, 40 L.Ed. 301, 16 Sup. Ct. Rep. 179; *McDonald v. Massachusetts*, 180 U.S. 311, 45 L.Ed. 542, 21 Sup. Ct. Rep. 389." *Id.* at 222 U.S. 623, 32 S.Ct. 585.

Spencer, *supra*, preserves the vitality of this historical concept with respect to Article 63, the habitual offender statute in question here.

The Determination of Punishment Is a Legislative Prerogative

Petitioner seeks to align himself with those petitioners dealt with in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); and *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861 (1977), cases dealing with imposition of the death penalty. His position, however, cannot be validly compared with those cases because death penalty decisions occupy a special place in Eighth Amendment jurisprudence. *Hall v. McKenzie*, 537 F.2d 1232 (4th Cir. 1976); *Carmona v. Ward*, 576 F.2d 405 (2nd Cir. 1978), cert. denied, U.S., 99 S.Ct. 874 (1979). See generally *Furman*, *supra*.

Unless a punishment is cruel, inhumane or arbitrary and shocking to the sense of justice, intervention by the courts is inappropriate because "the power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. 76, 93, 5 L.Ed. 37 (1820). Therefore, in reviewing a punishment, a court will assume its validity, and so long as that punishment is within the statutory limits, it will not be construed as cruel and unusual.

Gregg, supra; *Castle v. United States*, 399 F.2d 642 (5th Cir. 1968); *Hendrick v. United States*, 357 F.2d 121 (10th Cir. 1966); *United States v. Pruitt*, 341 F.2d 700 (4th Cir. 1964); in fact, this Court has never held that the length of a sentence by itself is cruel and unusual punishment.³

The Texas Habitual Offender Statute Has a Legitimate Penological Goal

The Texas legislature, like most other legislative bodies, has recognized that the objective of its penal laws is to ensure the public safety and that in achieving this objective, proper considerations are (1) the deterrent influence of penalties; (2) the rehabilitation of persons convicted of offenses; and (3) the punishment necessary to prevent the likely recurrence of criminal behavior. See Texas Penal Code § 1.02 (1974).

The Texas Penal Code of 1925, effective at the time of petitioner's conviction, manifests a clear intent by the Texas legislature to deter continuing or repetitive criminal activity by increasing the penalty for each succeeding offense. An offender committing his first felony offense was subject to the range of punishment attached to that particular offense. If he committed the same type of offense a second time, he was punished upon conviction by the maximum term for the same or similar offense. Texas Penal Code, Art. 62 (1925). Upon a third conviction for a felony offense, his punishment was a mandatory life sentence with parole. Texas Penal Code, Art. 63 (1925).

Petitioner asserts that a life sentence under the Habitual Offender Statute is so severe as to have no penological

3. A careful reading of *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), discloses that the sentence was overturned because of the harsh accessory penalties under *cadena temporal*, not the length of the sentence itself.

justification. However, deterrence through punishment, even if severe, is recognized as a legitimate penological goal. *McQuoid v. Smith*, 556 F.2d 595 (1st Cir. 1977). As this Court noted in *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), "by confining criminal offenders in a facility where they are isolated from the rest of society, a condition that most people presumably find undesirable, they and others will be deterred from committing additional criminal offenses."⁴ Id. at 417 U.S. 822, 94 S.Ct. 2804. Further, by isolating those individuals with a demonstrated propensity to commit felony offenses under the Habitual Offender Statute, society is at least afforded some protection from the criminal offenders most likely to engage in repetitive crime.

Petitioner intimates that rehabilitation is the only legally acceptable goal of punishment. Considering his status as a career criminal, his argument is understandable. There is, however, no constitutional requirement that "penal sanctions be designed solely to achieve therapeutic or rehabilitative effects." *Powell*, supra at 392 U.S. 530, 88 S.Ct. 2153. Increasing the period of incarceration with each new offense reflects a legislative decision that rehabilitation, no matter how laudable its purpose, becomes secondary to the deterrence of offenders who have proven incapable of reformation. Courts and legislatures must consider all of society's stake in the application of penal laws, not just those interests which benefit the criminal.

4. Whether a given penalty is an effectual deterrent to crime should not be at issue here. As Mr. Justice Marshall commented in *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968):

"The longstanding and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts." Id. at 392 U.S. 531, 88 S.Ct. 2153.

The Texas legislature, nevertheless, still provides petitioner with the incentive and opportunity for rehabilitation through parole, despite his persistent refusal to rehabilitate himself when given lesser sentences. Even with a "life" sentence, petitioner will be eligible for parole in 12 to 20 years. See Texas Code of Criminal Procedure, Art. 42.12; Texas Revised Civil Statutes, Art. 6184L; *Yeager v. Estelle*, 489 F.2d 276 (5th Cir. 1973); Brief of Respondent. In fact, by definition, "parole" means "the release of a prisoner for rehabilitation outside the prison walls." Texas Code of Criminal Procedure, Art. 42.12, § 2(b).

A legislature is the body politic which determines and expresses the public view on the seriousness of crime and the difficulties in suppressing crime in the community. To tamper with the legislative method of dealing with criminal conduct "is the gravest and most delicate duty" that the courts may perform. *Blodgett v. Holden*, 275 U.S. 142, 147, 48 S.Ct. 105, 107, 72 L.Ed. 206 (1927) (concurring opinion, Holmes, J.).

In *Gore v. United States*, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1950), attack was made on the excessiveness of a cumulative sentence under federal narcotics law. Recognizing the principle of judicial restraint, this Court refused to void the sentence, and held that Congress is the body best able to gauge which offenses pose the greatest danger to society and the method of deterrence. That is, when crime remains persistent and growing, it is within the legislative prerogative "to turn the screw of the criminal machinery—detection, prosecution and punishment—tighter and tighter" for the public good and well-being. Likewise, the Second Circuit in *Carmona*, supra, deferred to the New York legislature on the severity of narcotics laws within that state.

While Congress and the New York legislature have dealt severely with the enormous problem of illicit drugs in the United States and in New York State, the Texas legislature, as the voice of its citizens, is attempting to deal with a problem of equal magnitude within its own borders, the problem of professional and life-long criminals who refuse rehabilitative measures. For this Court to now say that recidivism in Texas does not pose as great a threat as does narcotics is to tell the Texas legislature that the judiciary is infinitely wiser and has a keener ability to assess the dangers of criminal activity in Texas than the legislative body.

Petitioner's Argument Rests on Erroneous Facts and Conclusions

To support his contention that his sentence is unconstitutional, petitioner relies on erroneous facts and conclusions. Close examination of petitioner's argument reveals that it depends on facts that have been misrepresented (while other facts have been selectively omitted) and conclusions based on speculation.

Petitioner first implies to the Court that prior to his conviction as an habitual offender, he had been convicted only twice of theft offenses, which he now claims border on the trivial and that he is merely a "petty offender." He further implies that none of his past convictions involve violence or use of a weapon. His actual criminal records reflect otherwise. In all, petitioner has nine other convictions, including convictions for burglary, aggravated assault on a female, and unlawfully carrying a deadly weapon. While petitioner himself may feel that his offenses were petty in nature, probably none of his victims would agree, especially the woman assaulted in 1968 and the numerous victims who suffered loss because of his burglary

and thefts. Nor were the offenses for which petitioner received his habitual status "trivial" to the legislature, which determined within its power that such offenses were to be classed as felonies rather than misdemeanors. Thus, any attempt to minimize petitioner's offenses goes beyond the latitude of proper judicial review.

Petitioner brashly asserts that the Texas Habitual Offender Statute and recidivist laws in general fail to isolate the true threat to the community, i.e., the dangerous criminal, and that it operates only on one like himself who "threatens no one." Petitioner's own survey, however, totally contradicts this proposition by disclosing that persons convicted under the Habitual Offender Statute engage in the entire spectrum of criminal activity, whether it be robbery, rape, murder, burglary, or theft. See Petitioner's Appendix, pp. 1-21. Further, there is no empirical basis, and petitioner can show none, for his claim that the habitual offender laws at most deter commission of petty offenses and may indirectly encourage commission of serious crimes. Petitioner's Brief, p. 52.

It is also noteworthy that petitioner must shore up his Eighth Amendment claim with a due process and equal protection argument under the Fourteenth Amendment when he alleges that application of the Habitual Offender Statute results in "nullification by individual judges, prosecutors and jurors," which "commensurately increases the incidence of potentially arbitrary variations in application standards." Petitioner's Brief, p. 60. With respect to mandatory sentences, this claim was laid to rest in *McQuoid*, supra:

"The second facet of appellant's eighth amendment argument is that the penalty's inflexibility will cause it to be applied so arbitrarily and unevenly as to amount to cruel and unusual punishment. Cf. *Furman*

v. Georgia, 408 U.S. 23, 92 S.Ct. 2726, 33 L.Ed.2d 346, (1972). It is contended that 'at various levels of the system—from the police officer on the beat to the trial judge in the courtroom—extra-legal and even illegal efforts will be made to ameliorate the rigors of the harsh legislative intent.' This theory, assuming its applicability to penalties other than death, is wholly speculative. The lack of flexibility in the present statute was obviously seen as a means of obtaining more rather than less uniform enforcement, and we cannot say that the legislature was necessarily wrong in this regard notwithstanding the considerations pointed out by appellant . . . Unlike situations addressed in *Furman*, the jury retains no discretion to impose or withhold the sentence. In virtually every kind of criminal case, police, juries and judges have some opportunity and often some temptation to exercise discretion extralegally."

"Nor does the supposed high likelihood of selective enforcement persuade us that the statute violates the due process clause of the fourteenth amendment. No parallel has been demonstrated between this rigid statute and vague or overly broad laws which encourage discriminatory enforcement because of the amount of discretion granted to arresting and prosecuting officials . . . The statute gives little discretion to anyone, and it is sheer speculation that officials will decline to enforce it regularly." Id. at 597-598.

Petitioner continuously complains that he has been punished for a mere theft offense just as severely as one punished for robbery, murder, or rape. But his comparison neglects the fact that the Texas sentencing structure does punish the rapist, robber, or murderer more severely than the thief who commits his first offense or his second off-

fense, thus allowing the thief many more opportunities to rehabilitate by means of lesser sentences. In petitioner's case, he was given opportunities to rehabilitate himself when he was convicted of burglary in 1960 and given a probated sentence, when he was convicted of credit card fraud in 1964 and assessed three years to serve, when he was given parole and later violated that parole, and when he was convicted of forgery in 1969 and assessed four years to serve. The more appropriate comparison demonstrates that first-time robbers, murderers, and rapists are in fact treated more harshly and do not receive the leniency petitioner has received throughout his criminal career. Murderers, rapists, and robbers upon their first conviction are subject to and often receive life sentences, whereas a thief cannot. Compare Texas Penal Code, Art. 1421 (1925) and Texas Penal Code § 31.03 (1974) with Texas Penal Code, Arts. 1189, 1257, 1405, 1409 (1925) and Texas Penal Code §§ 12.32, 19.02, 21.03, 29.03 (1974).

Federal Judicial Intervention Will Invade Lawful Prosecutorial Decision-Making

The District Attorney's decision to proceed against a habitual offender under Article 63 is based on information about the offender uniquely available to the District Attorney which has been gathered by law enforcement agencies. Primary consideration is given to the offender's prior convictions, both felony and misdemeanor, his arrests, his earlier cases disposed of through plea bargaining arrangements, other unindicted charges, and pending charges in other jurisdictions. This same information often influences the course of plea bargaining after an indictment is returned by the grand jury.

In reaching a decision to seek indictment of William James Rummel as a habitual offender under Article 63, the

prosecutor's files revealed that in addition to the two felony convictions for credit card fraud and forgery, Rummel had convictions for misdemeanor theft, unlawfully carrying a deadly weapon, burglary, aggravated assault on a female, swindling by check, a parole violation and a pending swindling case in which he was later convicted. The District Attorney's Office had also received for prosecution other checks which Rummel had used in swindling schemes in Bexar County (which were not prosecuted after he received a life sentence).⁵ Because his swindling and bad check activities were extensive, the Criminal District Attorney could not consider Rummel a mere petty thief and withhold prosecution of Rummel as an habitual offender. See Appendix at A-5.

The only legislative requirement for charging a defendant under the Habitual Criminal Statute is that he have at least two prior final felony convictions. Petitioner now seeks to have engrafted upon the statute other unspecified criteria which the prosecutor must use in making his charging decision. If this Court were to review the propriety of each habitual offender's sentence on an "as applied" or case-by-case basis, the Court would be required to determine from the prosecutor's files and records, the reasons and motives of the prosecutor for proceeding against the habitual offender. Thus, the Court would be attempt-

5. The dissenting opinion in *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), refers to this practice in the following language:

"From our experience as practicing attorneys or, perhaps, trial judges, how many times have cases come to our attention where it was known to the prosecutor that an accused had issued a veritable flood of bad checks but the prosecutor was satisfied to accept a plea of guilty as to one and dismiss the other charges? Is this not true with reference to multiple offenses of other types and kinds such as breaking and entering, robberies, and the like? What can an appellate court possibly know of the circumstances surrounding every recorded conviction?" *Id.* at 149, n.2.

ing to second-guess the prosecutor as to his determination of which criminals are mere trivial offenders.

In the past, this Court has expressly disallowed any judicial inquiry into the District Attorney's motive in prosecuting a defendant properly chargeable as an habitual criminal under the statute, unless his decision is based on "some unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962); *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663 (1978).

A failure by the Court to specify which offenses become trivial and which do not, would leave the prosecutor without guidelines in future cases. As Judge Thornberry correctly predicted in his dissent prior to rehearing en banc in this cause, the prosecutor cannot know the possible limits of error. *Rummel v. Estelle*, 568 F.2d 1193, at 1202 (5th Cir. 1978). If the test is monetary, is the amount in dollars controlling? Or, will monetary loss be considered relative to the financial circumstances of the victim? Would embezzling two million dollars from a bank or stealing millions of dollars worth of computer equipment from a corporation be more injurious than defrauding a widow of her \$2,000 life savings or stealing and forging the \$100 paycheck of a poor man with a family to support? Further, when is violence or danger to the victim a factor? Is actual physical harm required? Or is psychological harm enough? Are robbery with a toy pistol and rape of a seven year old girl without force "violent" crimes? And, which crimes create a potential for violence? Is burglary of an unattended vehicle or burglary of a home while the victims are away potentially violent crimes? Does perjury to free a heinous murderer have sufficient potential to be violent? What crimes have a sufficiently strong social interest? Sale of one marihuana cigarette? Possession of

one pound of marihuana? Or 500 pounds? Do bribery and gambling promotion possess sufficiently strong social interests?

The foregoing questions and hypotheticals are typical of the future problems which will confront the prosecutor if petitioner's position is sustained. The prosecutor's talents would require that he be clairvoyant and predict how serious the federal courts will perceive various offenses and combinations of offenses.

An additional question for the prosecutor is whether a negotiated guilty plea resulting from an agreement by the prosecutor to abandon the habitual counts in an indictment charging the defendant with a property crime and previous convictions for theft related offenses, will be held invalid because the plea was made under threat of receiving a "cruel and unusual" sentence under the Eighth Amendment. Up to this point in jurisprudence, this Court has made it clear that an inducement to plead guilty under a threat of prosecution as an habitual offender is not unconstitutional. *Bordenkircher*, supra. To sustain petitioner's argument would leave an unsettled position on this matter.

Not only would petitioner's position present unanswerable questions for prosecutors, but also for the trial courts of Texas. Article 63 by its terms is mandatory and a trial judge has no discretion to withhold or impose a life sentence. He would now be required to ignore the legislative will in each habitual offender case and independently decide whether or not to follow the statutory sentencing procedure. In practical effect, the Habitual Offender Statute would be emasculated, just as if it had been declared unconstitutional on its face. See *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973) (dissenting opinion, Boreman, J.).

CONCLUSION

In light of the more complete criminal record of petitioner provided by amicus, of which petitioner has failed to advise the Court, amicus prays that this tribunal adopt the en banc decision of the United States Court of Appeals for the 5th Circuit and affirm the judgment of the United States District Court for the Western District of Texas. Amicus requests that the Court render a conclusive finding that the sentencing provisions of the Texas Habitual Offender Statute do not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment as applied to the States through the Fourteenth Amendment.

Respectfully submitted,

BILL M. WHITE
Criminal District Attorney
Bexar County, Texas

KEITH W. BURRIS
Assistant Criminal District Attorney
Bexar County, Texas
Attorney for the Criminal District
Attorney of Bexar County, Texas
Amicus Curiae for Respondent

CERTIFICATE OF SERVICE

I, Keith W. Burris, Assistant Criminal District Attorney, Bexar County, Texas, hereby certify that on October 12, 1979, three (3) copies of the above and foregoing Brief and Appendix of the Criminal District Attorney of Bexar County, Texas, as Amicus Curiae were mailed to:

Mr. Scott J. Atlas
Vinson & Elkins
2100 First City National Bank Building
Houston, Texas 77002;

and that one (1) copy of the same was mailed to:

Mr. Charles Alan Wright
2500 Red River
Austin, Texas 78705;

and that three (3) copies of the same were mailed to:

Mr. Douglas M. Becker
Assistant Attorney General
P. O. Box 12548
Capitol Station
Austin, Texas 78711

KEITH W. BURRIS

**APPENDIX TO BRIEF OF THE CRIMINAL
DISTRICT ATTORNEY OF BEXAR COUNTY,
TEXAS, AS AMICUS CURIAE**

APPENDIX OF CONVICTIONS AND AFFIDAVIT

This Appendix contains documentation of the prior convictions of William James Rummel which are referred to in footnote No. 2, at page 3 of the Brief filed by Amicus Curiae, the Criminal District Attorney of Bexar County, Texas and Affidavit of Assistant Criminal District Attorney, John L. Quinlan, III.

Respectfully submitted,

KEITH W. BURRIS
Attorney for Amicus Curiae
The Criminal District Attorney for
Bexar County, Texas

HABITUAL INDICTMENT

(Filed January 31, 1973)

**IN THE NAME AND BY AUTHORITY OF THE STATE
OF TEXAS:**

The Grand Jury of Bexar County, State of Texas, duly organized, empaneled and sworn as such, at the January Term, A.D. 1973, of the 144th District Court of said County, in said Court, at said term, do present in and to said Court that WILLIAM J. RUMMEL, hereinafter called defendant, in the County of Bexar and State of Texas, on or about the 15TH day of AUGUST A.D. 1972, did then and there unlawfully and fraudulently take LAWFUL

MONEY OF THE UNITED STATES OF AMERICA over the value of \$50.00, from the possession of DAVID L. SHAW, hereinafter called complainant, the owner thereof, without the consent of the complainant and with the intent then and there on the part of the said defendant, to deprive the said complainant of the value of the same, and with the intent to appropriate the said property to the use and benefit of him, the said defendant; and the defendant did so appropriate the said property to the use and benefit of the said defendant;

And the Grand Jurors aforesaid do further present that prior to the commission of the aforesaid offense by WILLIAM J. RUMMEL, to-wit: on the 11TH day of MARCH A.D. 1969, in the 144TH District Court of BEXAR COUNTY, TEXAS, in Cause No. 68-977, on the docket of said Court, the said WILLIAM J. RUMMEL, hereinafter referred to as defendant, was duly and legally convicted in said last named Court of a felony less than capital, to-wit: PASSING AS TRUE A FORGED INSTRUMENT, upon an indictment then legally pending in said last named Court and of which said Court had jurisdiction; and said conviction was a final conviction and was a conviction for an offense committed by the defendant, prior to the commission of the offense hereinbefore charged against him, as set forth in the FIRST paragraph hereof.

And the Grand Jurors aforesaid do further present that prior to the commission of each of the aforesaid offenses by the defendant, to-wit; on the 16TH day of DECEMBER A.D. 1964, in the 144TH District Court of BEXAR COUNTY, TEXAS, in Cause No. 64-306, on the docket of said Court, the said WILLIAM J. RUMMEL, the aforesaid defendant, was duly and legally convicted in said last named Court of a felony less than capital, to-wit: PRESENTATION OF CREDIT CARD WITH INTENT TO DE-

FRAUD (CREDIT OR SERVICE OF THE VALUE OF FIFTY DOLLARS (\$50.00) OR MORE), upon an indictment then legally pending in said last named Court and of which said Court had jurisdiction; and said conviction was a final conviction and was a conviction for an offense committed by the defendant prior to the commission and conviction of the offense hereinbefore charged against him in the SECOND paragraph hereof, and said conviction set forth in this paragraph was prior to the commission of the offense set forth in the FIRST paragraph hereof; against the peace and dignity of the State;

John E. Smock
Foreman of the grand jury

IN THE MATTER OF WILLIAM JAMES RUMMEL
STATE OF TEXAS
COUNTY OF BEXAR

AFFIDAVIT OF JOHN L. QUINLAN, III

My name is John L. Quinlan, III and I am Chief of the Special Crimes Unit in the Bexar County District Attorney's Office. I have held that position since 1972. I and my staff are responsible for the prosecution of white collar criminals, hot check artists, forgers, persons engaged in organized crime and embezzlement.

On November 29, 1972, William J. Rummel was indicted by the Bexar County Grand Jury in cause number 72-2721, for passing a hot check over the value of \$50.00. Included in the indictment were two (2) enhancement paragraphs alleging that Rummel had two previous felony convictions, making him a habitual offender. Rummel was arrested and he thereafter made bond. While on bond, numerous other hot checks were presented to the District

Attorney's Office for prosecution; however, it was the general policy for the District Attorney to seek an indictment and conviction on only one case rather than seeking to prosecute for each an every hot check passed by an individual engaged in that type of activity.

On January 31, 1972, the Bexar County Grand Jury indicted William J. Rummel on a different matter in cause number 73-CR-214 for Theft over Fifty Dollars by False Pretext. This indictment also contained two additional paragraphs alleging that Rummel had been twice previously convicted of felony offenses making him a habitual offender.

I and members of my Special Crimes Unit were responsible for the prosecution of these two cases against Rummel and also the additional hot checks for which we did not seek indictments.

On more than one occasion, I reviewed the District Attorney's files in cause numbers 72-2721 and 73-CR-214. Both files contained court documents and rap sheets by law enforcement agencies which showed the previous criminal history of William J. Rummel. The District Attorney's files disclosed that William J. Rummel had been convicted in 1959 of Misdemeanor Theft, convicted in 1959 for Unlawful Possession of Alcoholic Beverages, convicted in 1960 of Unlawfully Carrying a Deadly Weapon, convicted in 1960 of Burglary, convicted in 1964 of Swindling by Check, convicted in 1964 of Credit Card Fraud, a 1966 parole violation, convicted in 1968 of Aggravated Assault on a Female, another conviction in 1968 for Swindling by Worthless check, and a conviction in 1969 for Passing a Forged Check. The Grand Jury which indicted Rummel as a habitual offender was also privy to this information. The files of the District Attorney's Office also revealed that

Rummel had numerous hot checks which he had passed in the San Antonio area and which had been turned over to the District Attorney's Office by the victims.

In deciding to prosecute William James Rummel as an habitual offender, I took into consideration his numerous prior convictions, the fact that he had two felony cases pending against him and numerous hot checks which we later decided not to prosecute. Additionally, I had been told that Rummel was not interested in a negotiated plea bargain on the case in which he was tried and given a life sentence; therefore, I dispatched one of my assistants, Tony Cantu, to try the Theft by False Pretext case, number 73-CR-214. Rummel was convicted and at the punishment phase of the trial, Mr. Cantu presented evidence showing that Rummel had been convicted of two previous felonies, namely: the Fraud by Credit Card conviction in 1964 and the Passing a Forged Check in 1969. It was not necessary under the habitual offenders statute, Art. 63, Texas Penal Code, to prove more than two previous felony convictions; therefore, evidence of Rummel's other convictions was not presented. He received the mandatory life sentence.

On the same day that the jury returned a life sentence against Rummel, he plead guilty to the other felony case pending against him in cause numbered 72-2721 upon a negotiated plea for three years. Because we had received a successful prosecution on these two cases, I decided not to seek indictments on the numerous other check cases against Rummel and those matters were dropped.

SWORN TO BY ME this the 8 day of October, A. D., 1979.

/s/ John L. Quinlan, III
John L. Quinlan, III

SWORN TO AND SUBSCRIBED before me this the
8 day of October, A. D., 1979, in Bexar County, Texas.

(Seal) /s/ (Illegible)
 Notary Public in and for
 Bexar County, Texas

PRIOR CONVICTIONS OF JAMES RUMMEL

THE ORIGINALS OF ALL OF
THE FOLLOWING PAGES OF THIS
APPENDIX WERE OF EXTREMELY POOR
QUALITY. WHAT APPEARS IS THE
BEST POSSIBLE REPRODUCTION
UNDER THE CIRCUMSTANCES.

No. 13818

IN THE
County Court at Law No. 1
OF BEXAR COUNTY, TEXAS

THE STATE OF TEXAS

vs.
Bill Rummel

422 W. Craig St

OFFENSE OF
Unlawfully Carrying Bowie
Knife

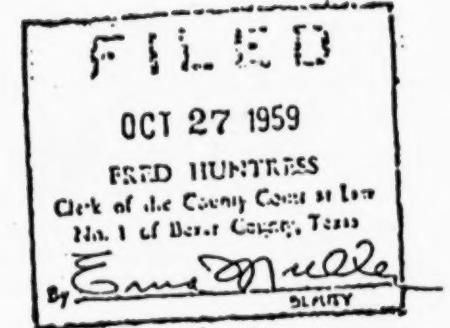
Filed the _____ day of _____ A. D. 19____

Clerk of the County Court, Bexar County

By _____ Deputy

WITNESSES

✓ D. Garrison, SAPD
✓ L. Reina, SAPD



No. 14-AFFIDAVIT FOR WARRANT OF ARREST

In the Name and by Authority of the State of Texas:

BEFORE ME, the undersigned authority, on this day personally appeared San Talamantes, who, after being by me duly sworn, on oath deposes and says that he has good reason to believe and does believe that in the County of Bexar and State of Texas, on or about the 20th day of October A. D. 19 59 and before the filing and making of this complaint in the State and County above said Bill Rummel, did then and there unlawfully carry on and about his person a Bowie knife.

contrary to the forms of the Statute, in such cases made and provided, and against the peace and dignity of the State.

Sam Talamantes

Sworn to and subscribed before me this 27th day of October A. D. 19 59

Jack Lee
Assistant Criminal District Attorney of Bexar County, Texas

Form 14-A-AW-CR-100

In the Name and by Authority of the State of Texas:

Now comes the undersigned, Assistant Criminal District Attorney of Bexar County, Texas, upon the affidavit of San Talamantes, hereto attached and made a part hereof, and in behalf of said State presents in the County Court at Law No. 1, of Bexar County, Texas, that heretofore, now on or about the 20th day of October A. D. 19 59, and before the taking and filing of this information, in said County of Bexar and State of Texas, Bill Rummel, did then and there unlawfully carry on and about his person a Bowie knife.

contrary to the forms of the Statute, in such cases made and provided, and against the peace and dignity of the State.

Jack Lee
Assistant Criminal District Attorney of Bexar County, Texas

Certified Copy of Judgment of Conviction on Plea of Guilty. Trial by Court.

THE STATE OF TEXAS No. 120,018.
vs.
Bill Rummel Offense: Unlawfully Carrying a Bowie
Knife.

On this, the 21st day of January, A.D. 1960, the above entitled and numbered cause was called for trial, both parties appearing and announcing ready for trial. The information having been read by the Criminal District Attorney of Bexar County, Texas, the defendant, in open court, pleaded guilty to the charge therein contained and waived a trial by jury and submitted this cause to the court; whereupon the court administered the defendant of the consequences of such plea, but the defendant, Bill Rummel, persisted in pleading guilty, and, after due inquiry, it plainly appearing to the court that the defendant is sane and is uninfluenced by any consideration of fear, by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of guilty was received by the court.

The court, having heard and duly considered defendant's said plea of guilty to the charge contained in the information herein, and the evidence, is of the opinion and finds that the defendant is guilty of the offense of unlawfully carrying a Bowie Knife and that his punishment should be, and the same is hereby assessed by a fine of one hundred (\$100.00) dollars.

It is, therefore, considered, ordered and adjudged by the court that the State of Texas recover of the defendant the amount of such fine herein imposed upon him, and all costs of the prosecution, for which execution may issue against the property of said defendant; and that the defendant, being present in court, be committed to jail, there to remain in custody, until such fine and all costs are paid and until he shall have fully satisfied and discharged the judgment herein imposed upon him as provided by law.

THE STATE OF TEXAS,
COUNTY OF BEXAR.

I, FRED HUNTRESS, Clerk of the County Court at Law No. 1, of Bexar County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the judgment of conviction in the case styled The State of Texas vs. Bill Rummel, and being No. 120,018, on the criminal docket of said court, and as appears in the criminal minutes of said court in volume 14, page 395.

In testimony whereof witness my hand and official seal in the City of San Antonio, Texas, this 21st day of Jan., 1960.

FRED HUNTRESS,
Clerk, County Court at Law No. 1
of Bexar County, Texas.
By *Emile Donalson*, Deputy.

P.G. Mar 5. 60.

Fee Book Volume 8 Page 9

No. 120,018.

In the County Court at Law No. 1,
of Bexar County, Texas

**CERTIFIED COPY OF JUDGMENT
WITH BILL OF COSTS**

THE STATE OF TEXAS

vs.	Bill Rummel
Address:	FEB 4 1960
Bondsmen:	FRED HUNTRESS
Address:	No 14 Jan 21
Bondsmen:	Emile Donalson
Address:	21

Jan 60
30 Jan 60
10 days \$100.00
Bexar Co. Jail
C. Hernandez, Jr.

Satisfied in full
FEB 4 1960
Clerk, County Court at Law No. 1
Sheriff, Bexar County, Texas
By *H. K. Sipe Jr.*, Deputy.

Came to hand the 21 day of January, A.D. 1960, and executed
the 21 day of January, A.D. 1960, by *C. Hernandez, Jr.*

CERTIFICATE

THE STATE OF TEXAS,
COUNTY OF BEXAR

I, ROBERT D. GREEN, Clerk of the County Court at Law No. 1 , of
Bexar County, Texas, do hereby certify that the foregoing is a true
and correct copy of COMPLAINT AND INFORMATION, AND JUDGMENT WITH BILL
OF COSTS.

In Cause No. 120714

wherein THE STATE OF TEXAS, vs

BILL RUSSELL

Defendant.

as the same appears on file in my office.

Witness my hand and seal of the Court at my office in San Antonio
Texas, this the 15 day of SEPTEMBER A.D. 1979

ROBERT D. GREEN

Clerk of the County Courts at Law
of Bexar County, Texas

by John C. T. Green, Deput

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1

**IN THE DISTRICT COURT
OF**

125-13 County, Texas

In the above entitled and numbered cause, it appearing to the court that the defendant has been found guilty of the offense of Assault, & Battery, and his punishment assessed by the court at confinement in a penitentiary for a term of 3 years, and that sentence has before been imposed upon the defendant under the judgment herein:

And it further appears to the Court that the defendant has never heretofore been convicted of a felony in any state or territory.

And it further appears to the court that the best interests of the public and of the defendant as well will be served by the suspension of the execution of the sentence herein:

It is therefore ORDERED, ADJUDGED and DECREED by the Court that the execution of the sentence pronounced upon the defendant in this cause be and the same is hereby suspended, and the defendant shall be prohibited for the term of two' sentences, upon the following terms and conditions:

This gives the system its name, the *inflection chain*.

- (1) Commit no offense against the laws of _____ State or any other state or of the United States of America.

(2) Abstain from the use of intoxicating liquor of any kind.

(3) Refrain from gambling in all forms.

(4) Stay away from bars, dance, pool halls, liquor stores and all other places where gambling is permitted, or where liquor is sold, except those places of eating places.

(5) Avoid association with persons of immoral character or who violate the laws of the State.

(6) Seek frequent employment in some lawful and useful occupation, and work reasonably to provide the means of subsistence.

(7) Support the law, if any, and not break it.

(8) Report in person or by letter to the sheriff of this county on or within ten days before the first Monday in _____ and _____, leaving _____ of every postmaster, and the sheriff of this plantation, leaving and sheriff his address, name and status, any employer he may have, and name and address of his employer, if any.

(9) Report to the sheriff of this county, in person, or by letter, within five days after any charge of any offense, any day or night, time of day, _____, be made against him, stating the offense charged and the Court in which the charge is tried.

(10) Inform the sheriff of this county, in person, or by letter, of any change of address within the days after such change.

(11) Not leave the State of Texas without first obtaining an order in writing from this court, authorizing such removal.

(12) _____

Digitized by srujanika@gmail.com

- (13) _____

(14) _____

James W. Johnson—Judicial District of Texas

144864

No. 144923

In the County Court at Law No. 2
of Bexar County, Texas

THE STATE OF TEXAS

vs.

William James Rummel

City Jail

OFFENSE

HOT CHECK

(Giving Check Without Sufficient Funds)

WITNESSES:

Mona Williford

3862 Pan Am- Holiday Inn

In the Name and by Authority of the State of Texas:

Now comes the undersigned, Assistant Criminal District Attorney of Bexar County, Texas, upon the affidavit of Z. Stanley,

which is hereunto attached and made a part hereof, and in behalf of said State, presents in and to the County Court at Law No. 2 of Bexar County, Texas, that heretofore, to-wit: on or about the 22nd day of December A. D. 1963, and prior to the making and filing of this information in the County of Bexar and State of Texas,

William James Rummel

did then and there unlawfully, with intent to defraud, Nona Williford, Agent for Holiday Inn, a corporation, incorporated under the laws of the State of Texas, give to the said Nona Williford, Ms. check for the sum of Thirty Dollars drawn on First Nicholas National Bank of Kennedy, Texas, in exchange for Lawful Money of the United States of America and of the total value of Thirty Dollars, which check was in the tenor following:

COURTESY OF NORTH HILL National Bank
2030 AUSTIN HIGHWAY AT LANARK DRIVE SAN ANTONIO, TEXAS

Dec. 22 1963

PAY TO THE ORDER OF	Holiday Inn	\$30 00/
Thirty and 00/00 VALUE RECEIVED AND CHARGE TO ACCOUNT WITH EXCHANGE		DOLLARS
TO First Nicholas Natl. BANK	William James Rummel	SIGNATURE
Kenedy Texas	STATE	Star Route
City	ADDRESS	Kenedy, Texas PHONE
PLEASE ENTER ACCOUNT NUMBER OL 926287		
that the said Nona Williford accepted said check in payment for said Lawful Money of the United States of America and believed it to be good, and he payment was relied upon by Nona Williford and the said William James Rummel, then and there did not have and knew he did not have sufficient funds with said bank to pay said check and all other checks, drafts and orders outstanding upon such funds at the time said check was given and drawn; that said check was presented to said bank for payment and payment was refused for want of sufficient funds of the said William James Rummel contrary to the terms of the Statute, in such cases made and provided and against the peace and dignity of the State.		

In the Name and by Authority of the State of Texas:

Before me, the undersigned authority, on this day personally appeared Z. Stanley

who, after being by me duly sworn, on oath deposes and says that he has good reason to believe and does believe that heretofore, to-wit on or about the 22nd day of December A.D. 1963 and prior to the making and filing of this complaint, in the County of Bexar and State of Texas,

William James Rummel

did then and there unlawfully, with intent to defraud Nona Williford, Agent for Holiday Inn, a corporation, incorporated under the laws of the State of Texas, give to the said Nona Williford his check for the sum of Thirty Dollars drawn on First Nicholas National Bank of Kennedy, Texas in exchange for Lawful Money of the United States of America and of the total value of Thirty Dollars, which check was in the tenor following:

COURTESY OF NORTH HILL National Bank
2030 AUSTIN HIGHWAY AT LANARK DRIVE SAN ANTONIO, TEXAS

Dec. 22 1963

PAY TO THE ORDER OF Holiday Inn \$30 00/

Thirty and 00/00 DOLLARS
VALUE RECEIVED AND CHARGE TO ACCOUNT WITH EXCHANGE

TO First Nicholas Nat'l.
BANK William James Rummel
Kennedy Texas SIGNATURE
City STATE Star Route Kennedy, Texas
ADDRESS OL 926287
PHONE

PLEASE ENTER ACCOUNT NUMBER
that the said Nona Williford accepted said check in payment
for said Lawful Money of the United States of America and believed it to be good, and its
payment was relied upon by Nona Williford and the said
William James Rummel then and there did not have and knew he did
not have sufficient funds with said bank to pay said check and all other checks, drafts
and orders outstanding upon such funds at the time said check was given and drawn
that said check was presented to said bank for payment and payment was refused for
want of sufficient funds of the said William James Rummel
contrary to the forms of the statute, in such cases made and provided, and against the peace and dignity
of the State.

Sworn to and subscribed before me on this, the 15th day of January, A.D. 1964.

T. S. P. (Signature)
Assistant Criminal District Attorney of Bexar County, Texas.

Certified Copy of Judgment of Conviction on Plea of Guilty. Trial by Court

THE STATE OF TEXAS

No. 144938

vs.

William James Rummel

On this, the _____ day of _____, A.D. 19____, the above entitled and numbered cause was called for trial, both parties appearing and answering ready for trial. The _____ having been read by the Criminal District Attorney of Bexar County, Texas, the defendant, in open court pleaded guilty to the charge therein contained and waived a trial by jury and submitted this cause to the court; whereupon the court admonished the defendant of the consequences of such plea, but the defendant William James Rummel persisted in pleading guilty, and, after due inquiry, it plainly appearing to the court that the defendant is sane and is uninfused by any consideration of fear, by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of guilty was received by the court.

The court having heard and duly considered defendant's said plea of guilty to the charge contained in the _____ herein, and the evidence, is of the opinion and finds that the defendant is guilty of the offense of Hot Check

and that his punishment should be, and the same is hereby assessed at a fine of One (\$1.00) dollar and Six (6) months in jail. Case #144938 to run C.C. with Court 144938

It is, therefore, condemned and adjudged by the court that the State of Texas recover of the defendant the amount of such fine herein imposed upon him, and all costs of the prosecution, for which execution may issue against the property of said defendant; and that the defendant, being present in court, be committed to jail, there to remain in custody, until such fine and all costs are paid and until he shall have fully satisfied and discharged the judgment and sentence herein imposed upon him as provided by law.

THE STATE OF TEXAS,
COUNTY OF BEXAR.

I, JAMES W. KNIGHT, Clerk of the County Court at Law No. 2, of Bexar County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the judgment of conviction in the case styled The State of Texas vs. William James Rummel, and being No. 144938, on the criminal docket of said court, and as appears in the criminal minutes of said court in volume 23, page 23.

In testimony whereof witness my hand and official seal in the City of San Antonio, Texas, this _____ day of _____, 19____.

JAMES W. KNIGHT,
Clerk, County Court at Law No. 2
of Bexar County, Texas.

By J. E. [Signature], Deputy.

BILL OF COSTS

CLERK'S FEES	Dollars	Cts.	SHERIFF'S FEES	Dollars	Cts.
Entering Information		.10	Arrest and Bond	3	50
Docketing Cause		.25	Summoning Witnesses at 75c each		
Issuing Capias		.75	Mileage		
Entering Appearance (15c)			Commitment and release	4	00
Issuing Subpoenas at 25c each					
Inserting Additional Names at 15c each			TOTAL	7	50
Entering Continuance (25c)			Criminal District Attorney	15	00
Entering Motions at 10c each			Jury Fee (35.00)		
Entering Orders at 50c each			Trial Fee	5	00
Entering Judgment			Witness Fees		
Swearing and Impaneling Jury and Receiving Verdict (50c)			Costs in Court		
Filing Papers at 10c each	10		Stenographer's Fee (33.00)		
Commitment	1	.00	TOTAL	20	00
Swearing Witnesses at 10c each			RECAPITULATION		
			Clerk's Fees	2	70
			Sheriff's Fees	2	50
			Other Costs and Fees	20	00
			Fine	1	00
			Jail Sentence 6 months		
TOTAL	2	70	TOTAL FEES, COSTS AND FINE	31	20

THE STATE OF TEXAS
COUNTY OF BEXAR }

I, JAMES W. KNIGHT, Clerk of the County Court at Law

No. 2, of Bexar County, Texas, hereby certify the above to be a true and correct account of the fine and costs due in the above entitled and numbered cause at this date.

Witness my hand and seal of office at San Antonio, Texas, this _____ day of

_____, 19_____
JAMES W. KNIGHT Clerk
County Court at Law No. 2, of Bexar County, Texas,
By Wm. W. Knight, Jr., Deputy.
Issued: _____, 19_____

Fee Book Volume 25 Page 518

No. 144938

In the County Court at Law No. 2,
of Bexar County, TexasCERTIFIED COPY OF JUDGMENT
WITH BILL OF COSTS

THE STATE OF TEXAS

vs.

William James Runnel

Custody

Address:

Bondsman:

Address:

Came to hand the 7 day of July, A.D. 1964, and executed
the 7 day of July, A.D. 1964, by Wm. W. Knight, Jr., Deputy.Satisfied in full
W. B. Hill, Sheriff
W. B. Hill, Deputy.

Sheriff, Bexar County, Texas.

16

16

16

Mon	6	July	64	4	31	20	64
mos	cc	with	1964				
Religious services by Sheriff O.S. Nance Deputy							

CERTIFICATE

THE STATE OF TEXAS,
COUNTY OF BEXAR

I, ROBERT D. GREEN, Clerk of the County Court at Law No. TWO, of
Bexar County, Texas, do hereby certify that the foregoing is a true
and correct copy of COMPLAINT AND INFORMATION, AND JUDGMENT WITH BILL OF COSTS,

in Cause No. 144938

wherein THE STATE OF TEXAS, vs.

WILLIAM JAMES RUMMELL

Defendant,

as the same appears on file in my office.

Witness my hand and seal of the Court at my office in San Antonio
Texas, this the 15TH day of SEPTEMBER , A.D. 1979 .

ROBERT D. GREEN

Clerk of the County Courts at Law #2
of Bexar County, Texas

by Robert D. Green, Deputy

No. 144864

In the County Court at Law No. 2

of Bexar County, Texas

THE STATE OF TEXAS

vs.

William James Rummell

708 Veindo

OFFENSE

HOT CHECK

(Giving Check Without Sufficient Funds)

WITNESSES:

Elton Frost

4503 Blanco Rd. DI4-5211

In the Name and by Authority of the State of Texas:

Now comes the undersigned, Assistant Criminal District Attorney of Bexar County, Texas, upon the affidavit of Z. Stanley,

which is hereto attached and made a part hereof, and in behalf of said State, presents in and to the County Court at Law No. 2, of Bexar County, Texas, that therefore, to-wit on or about the 25th day of July, A.D. 1963, and prior to the making and filing of this information in the County of Bexar and State of Texas,

William James Rummel

did then and there unlawfully, with intent to defraud, Elton Frost, Agent for H. E. Butt Grocery Co., a corporation, incorporated under the laws of the State of Texas, give to the said Elton Frost the check for the sum of Ten Dollars, drawn on National Bank of Commerce of San Antonio, Texas, in exchange for Lawful Money of the United States and of the total value of Ten Dollars, which check was in the tenor following:

San Antonio, Texas, July 25 1963 No.

Name of BANK National Bank of Commerce
OF San Antonio, Texas

PAY TO THE
ORDER OF H. E. B. FOOD STORES \$10 00

Ten and 00/100 DOLLARS
I hereby certify that I have sufficient funds to my credit at the above Bank, free from any claim.

Address 708 Viendo

Phone No. Pa 5 6178 Value received and charge to the account of William James Rummel
Acc't No. 459-453

that the said Elton Frost accepted said check in payment for said William James Rummel and believed it to be good, and its payment was relied upon by Elton Frost and the said William James Rummel then and there did not have and knew he did not have sufficient funds with said bank to pay said check and all other checks, drafts and orders outstanding upon such funds at the time said check was given and drawn; that said check was presented to said bank for payment and payment was refused for want of sufficient funds of the said William James Rummel, contrary to the forms of the Statute, in such cases made and provided, and against the peace and dignity of the State.

T. L. Crowley
Assistant Criminal District Attorney of Bexar County, Texas.

In the Name and by Authority of the State of Texas:

Before me, the undersigned authority, on this day personally appeared Z. Stanley

who, after being by me duly sworn, on oath deposes and says that he has good reason to believe and does believe that herebefore, to-wit on or about the 25th day of July, A.D. 1963, and prior to the making and filing of this complaint, in the County of Bexar and State of Texas,

William James Rummel

did then and there unlawfully, with intent to defraud, Elton Frost, Agent for H. E. Butt Grocery Co., a corporation, incorporated under the laws of the State of Texas, give to the said Elton Frost the check for the sum of Ten Dollars, drawn on National Bank of Commerce of San Antonio, Texas, in exchange for Lawful Money of the United States and of the total value of Ten Dollars, which check was in the tenor following:

San Antonio, Texas, July 25 1963 No.

Name of BANK National Bank of Commerce
OF San Antonio, Texas

PAY TO THE
ORDER OF H. E. B. FOOD STORES \$10 00

Ten and 00/100 DOLLARS
I hereby certify that I have sufficient funds to my credit at the above Bank, free from any claim.

Address 708 Viendo

Phone No. Pa 5 6178 Value received and charge to the account of William James Rummel
Acc't No. 459-453

that the said Elton Frost accepted said check in payment for said William James Rummel and believed it to be good, and its payment was relied upon by Elton Frost and the said William James Rummel then and there did not have and knew he did not have sufficient funds with said bank to pay said check and all other checks, drafts and orders outstanding upon such funds at the time said check was given and drawn; that said check was presented to said bank for payment and payment was refused for want of sufficient funds of the said William James Rummel, contrary to the forms of the Statute, in such cases made and provided, and against the peace and dignity of the State.

T. L. Crowley
Assistant Criminal District Attorney of Bexar County, Texas.

Swear to and subscribed before me on this, the 6th day of January, A.D. 1963.

Certified Copy of Judgment of Conviction on Plea of Guilty. Trial by Court.

THE STATE OF TEXAS

No. 144864

vs. Offense: Hot HeckWilliam James Rummel

On this, the 18 day of July, A.D. 1919, the above entitled and numbered cause was called for trial, both parties appearing and announcing ready for trial. The having been read by the Criminal District Attorney of Bexar County, Texas, the defendant, in open court, pleaded guilty to the charge therein contained and waived a trial by jury and submitted this cause to the court; whereupon the court admonished the defendant of the consequences of such plea, but the defendant, William James Rummel,

persisted in pleading guilty, and, after due inquiry, it plainly appearing to the court that the defendant is sane and is uninfluenced by any consideration of fear, by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of guilty was received by the court.

The court having heard and duly considered defendant's said plea of guilty to the charge contained in the Indictment herein, and the evidence, is of the opinion and finds that the defendant is guilty of the offense of Hot Heck,

and that his punishment should be, and the same is hereby, assessed at a fine of One (\$1.00) dollar and Six (6) months in jail. Court 144864 to run C.C. with One (\$1.00) fine.

2nd Degree

It is, therefore, considered, adjudged and edjudged by the court that the State of Texas recover of the defendant the amount of such fine herein imposed upon him, and all costs of the prosecution, for which execution may issue against the property of said defendant; and that the defendant, being present in court, be committed to jail, there to remain in custody, until such fine and all costs are paid and until he shall have fully satisfied and discharged the judgment and sentence herein imposed upon him as provided by law.

THE STATE OF TEXAS,
COUNTY OF BEXAR.

JAMES W. KNIGHT, Clerk of the County Court at Law No. 2, of Bexar County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the judgment of conviction in the case styled The State of Texas vs. William James Rummel, and being No. 144864 on the criminal docket of said court, and as appears in the criminal minutes of said court in volume 2, page 2.

In testimony whereof witness my hand and official seal in the City of San Antonio, Texas, this 18 day of July, 1919.

JAMES W. KNIGHT,
Clerk, County Court at Law No. 2,
of Bexar County, Texas.
S. L. Smith, Deputy.

BILL OF COSTS

CLERK'S FEES	Dollars	Cts.	SHERIFF'S FEES	Dollars	Cts.
Entering Information		.10	Arrest and Bond	<u>3</u>	<u>50</u>
Docketing Cause		.25	Summoning Witnesses at 75c each		
Issuing Capias		.75	Mileage		
Entering Appearance (15c)			Commitment and release	<u>4</u>	<u>00</u>
Issuing Subpoenas at 25c each					
Inserting Additional Names at 15c each			TOTAL	<u>7</u>	<u>50</u>
Entering Continuance (25c)			Criminal District Attorney	<u>15</u>	<u>.00</u>
Entering Motions at 10c each			Jury Fee (\$5.00)		
Entering Orders at 50c each			Trial Fee	<u>5</u>	<u>.00</u>
Entering Judgment		.50	Witness Fees		
Swearing and Impaneling Jury and Receiving Verdict (50c)			Costs in Court		
Filing <u>1</u> Papers at 10c each	<u>10</u>		Stenographer's Fee (\$3.00)		
Commitment	<u>1</u>	.00	TOTAL	<u>20</u>	<u>00</u>
Swearing Witnesses at 10c each			RECAPITULATION		
			Clerk's Fees	<u>2</u>	<u>70</u>
			Sheriff's Fees	<u>7</u>	<u>50</u>
			Other Costs and Fees	<u>20</u>	<u>00</u>
			Fine	<u>1</u>	<u>00</u>
			Jail Sentence <u>6 months</u>		
TOTAL	<u>2</u>	<u>70</u>	TOTAL FEES, COSTS AND FINE	<u>31</u>	<u>20</u>

THE STATE OF TEXAS,
COUNTY OF BEXAR,

I JAMES W. KNIGHT, Clerk of the County Court at Law No. 2, of Bexar County, Texas, hereby certify the above to be a true and correct account of the fine and costs due in the above entitled and numbered cause at this date.

Witness my hand and seal of office at San Antonio, Texas, this 18 day of July, 1919.

JAMES W. KNIGHT Clerk,
County Court at Law No. 2, of Bexar County, Texas,
Issued: _____, 19_____.
By J. David Spain, Deputy.

Fee Book Volume 25 Page 518

No. 144864

In the County Court at Law No. 2,
of Bexar County, Texas

**CERTIFIED COPY OF JUDGMENT
WITH BILL OF COSTS**

THE STATE OF TEXAS

vs. William James Rummel

Address: In custody

Bondsman:

Address:

Bondsman:

Address:

*Received July 17, 1964
on 17 July 64 \$31.00
F.M.O.S. cc with 144938
All debts being paid by Sheriff
J. W. Hauck
J. W. Hauck
J. W. Hauck*

SHERIFF'S RETURN	
Came to hand the <u>7</u> day of <u>July</u> , A.D. <u>1978</u> and executed the <u>7</u> day of <u>July</u> , A.D. <u>1978</u> by <u>J. W. Hauck</u>	<u>31</u>
Satisfied in full W. B. "Bill" Hauck, Sheriff Deputy	By <u>J. W. Hauck</u>
Sheriff, Bexar County, Texas	
Deputy.	

C E R T I F I C A T E

THE STATE OF TEXAS,
COUNTY OF BEXAR

I, ROBERT D. GREEN, Clerk of the County Court at Law No. TWO, of Bexar County, Texas, do hereby certify that the foregoing is a true and correct copy of COMPLAINT AND PETITION, AND JUDGMENT WITH BILL OF COSTS,

in Cause NO. 144864

wherein THE STATE OF TEXAS, vs

WILLIAM JAMES RUMMEL

Defendant.

as the same appears on file in my office.

Witness my hand and seal of the Court at my office in San Antonio Texas, this the 15th day of SEPTEMBER, A.D. 1978.

ROBERT D. GREEN

Clerk of the County Courts at Law #2
of Bexar County, Texas

by H. H. Green, Deputy

NO. 643C6

THE STATE OF TEXAS

43

•Lester J. Knobell

CONVICTED OF THE OFFENSE OF

**TRANSCRIPT OF JUDGEMENT
AND SENTENCE**

PLEA OF GUILTY - BEFORE COURT

FELONY

JUDGMENT - PLAID OF GUILTY BEFORE THE COURT - FELONY - MURDER

THE STATE OF TEXAS

No. 54336

**144th JUDICIAL DISTRICT COURT
BEXAR COUNTY, TEXAS**

OFFENSE: *Pilotage* or *Navigation*
CANADA *and* *International* *or* *Universal* *Convention*.
OR *Regulation* *or* *Code* *of* *Navigation* *or* *Shipping*
or *Ports*)

On the th 19th day of December 1964, A.D. 1964, the above entitled and numbered cause being called for trial, appeared the parties, the State by her District Attorney, and the defendant,

ILLINOIS • NURSE

in person and by attorney, thereupon appointed by the Court), in open Court having stated to the Court that he desired to waive a jury and plead guilty before the Court and which request of said defendant to plead guilty and waive a jury was concurred to and approved by the Court and is hereby entered of record on the minutes of the Court. And the duly elected and acting Attorney representing the State having, by an instrument in writing filed in the papers of this cause, waived a jury herein and concurred and approved such waiver of the right of a trial by jury of the defendant hereina, and both parties having concurred ready for trial, said cause proceeded to trial before the Court without the intervention of a jury, and the indictment having been read by the Court and defendant, in person, in open Court, pleaded guilty to the charge therein contained, and thereupon the Court admonished the defendant of the consequences of such plea; but the defendant persisted in such plea, and after due inquiry, it plainly appearing in the Court that the defendant is sane and unfluenced by any consideration of fact, by cog persuasion or delusive hope of pardon prompting him thereto to confess his B&C guilt in making said plea of guilty, the said plea of guilty was received by the Court and entered of record upon the Minutes. And the Court having heard said plea of guilty to a felony less than a

and having heard the evidence which was submitted and the argument of counsel, and ..., duly considered
same, is of the opinion that said defendant is guilty of a felony less than a capital offense, to wit: Robbery with
Kidnapping and Extortion (\$50,000.00 Unlawful) as charged in the indictment, and should be punished
by confinement in the State Penitentiary for a term of Three(3) years.

It is therefore considered, ordered and adjudged by the Court that the defendant, William J. Russell,

is guilty of the offence of
Fraud in the sum of £ 200.00
and the sum of £ 50.00 in moneys which he has paid guilty, and that he
be punished as has been determined by the Court of confinement in the State Penitentiary for a term of
three years.

1. Is further ordered by the Court, that the State of Texas do have and recover from said defendant all costs
of the prosecution for which execution may issue, and then the defendant be remanded to jail, if he so remains in
a study to await the further order of the Court.

It is further ordered by the Court on this day x . A.D. 18 .
that the execution of sentence is suspended, and the defendant x x x

is placed on probation in accordance with the Conditions of Adult Probation attached hereto and a copy of which was delivered to the defendant this date.

• 3,000.

Dale S. Brown

SENTENCE - PLEA OF GUILTY BEFORE THE COURT - FELONY

THE STATE OF TEXAS

NO. 61305

VS.

William J. Rummel144th JUDICIAL DISTRICT COURT
BEXAR COUNTY, TEXASOFFENSE: POSSESSION PAUL W CHILL'S CARD
WITH INTENT TO DEFraud (CASH OR SEMI-
VALU OF THE VALUE OF \$50.00 OR MORE)

In this the 16th day of December, A.D. 1966, in the above numbered and entitled cause, again appeared in open Court the state, by her District Attorney, the defendant's attorney, and the defendant William J. Rummel who was brought in person before the Court by the Sheriff for the purpose of having sentence of the law pronounced upon him in accordance with the judgment which, on the 16th day of December, A.D. 1966, has been rendered and entered against him, said defendant having waived trial.

And thereupon the Court asked the defendant, William J. Rummel, whether he had anything to say why the sentence should not be pronounced against him, to which he answered "Nothing". Thereupon the Court, in the presence of the said defendant William J. Rummel, pronounced sentence against him as follows:

"It is considered and ordered by the Court that the defendant, William J. Rummel, who has been adjudged to be guilty of POSSESSION PAUL W CHILL'S CARD WITH INTEND TO DEFraud and whose punishment has been assessed by the Court against him, be committed to the penitentiary of the State of Texas for a term of Three(3) years, to commence delivered to the Sheriff of Bexar County, Texas, to the Director of Corrections of the State of Texas, or other persons legally authorized to receive such convict, who shall convey him to said penitentiary, there to be confined and imprisoned for the period of no less than Two(2) years and more than three(3) years, in accordance with the provisions of the law governing the penitentiaries of the State." Said sentence to begin and operate from the 22nd day of December, 1966, the date of defendant's incarceration.

And the said William J. Rummel is remanded to jail until the said Sheriff can carry out the execution of this sentence."

Archie A. Brown

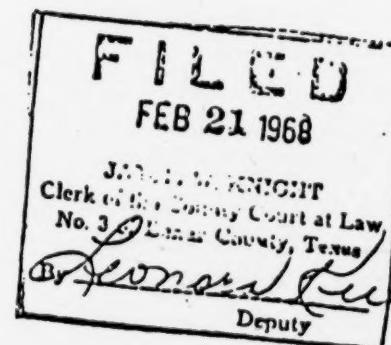
ARCHIE A. BROWN, JUDGE PRESIDING

JAN 23, 1967

No. 157124IN THE
County Court at Law No. 3
OF BEXAR COUNTY, TEXAS

THE STATE OF TEXAS

VS.

William James Rummel
Takitten Parks Carpenter
707 E. Broadway

*Aggravated
Assault
Female*

Filed the _____ day of _____ A.D. 1968

Clerk of the County Court, Bexar County

By _____ Deputy

WITNESSES

Penny Rummel
115 BuckinghamCly J. Leon #153 SAPJulieta De La Rose
115 Buckingham

In the Name and by the Authority of the State of Texas:

Now comes the undersigned, Assistant Criminal District Attorney of Bexar County, Texas, upon the affidavit of Pearney Lee 22-2261 hereto attached and made a part hereof, and in behalf of the said State presents in the County Court at Law No. 3 of Bexar County, Texas,

21 day of February, A. D. 1968, and before the making and filing of this information, in said County of Bexar and State of Texas, William James
Reserve

In and upon Penny Russell did then and there unlawfully commit an aggravated assault and battery and did then and there strike, beat, bruise and wound the said. Penny Russell
the said. Willie James Gagey being then and there an adult male and the said Penny Russell
being then and there a female.

contrary to the forms of the Statute, in such cases made and provided, and against the peace and dignity of the State.

J. Jackson Clegg
Assistant Criminal District Attorney of Bexar County, Texas

In the Name and by the Authority of the State of Texas:

BEFORE ME, the undersigned authority, on this day personally appeared J. L. Murray
F. J. Fennel who, after being by me duly sworn, on oath deposes and says that R. C. Black
F. J. Fennel

in the County of Bexar and State of Texas, on or about the 21 day of February A. D. 1968
and before the making and filing of this complaint in the State and County aforesaid.
In and upon Penny Lee Russell did then and there
unlawfully commit an aggravated assault and battery and did then and there strike, beat, bruise and
wound the said Penny Lee Russell
the said Richard George Russell
being then and there an adult male and the said Penny Lee Russell
being then and there a female.

contrary to the forms of the Statute, in such cases made and provided, and against the peace and dignity of the State.

Sworn to and submitted before me this 21 day of October A.D. 1965
John C. Ladd,
Assistant Criminal District Attorney of Bexar County, Texas.

Fine	Clerk	Trial Fee	Dist Atty.	Sheriff	Jury	Misc. & Steno.	Total
-0-	\$15.00	\$5.00	\$15.00	\$9.00			\$44.00

30 days Jail

Certified Copy of Judgment of Conviction on Plea of Guilty. Trial by Court.

THE STATE OF TEXAS

No. 157124

vs.

Offense: Aggravated Assault

on a Female

William James Rummel

On this, the 23rd day of April, A.D. 19 68, the above entitled and numbered cause was called for trial, both parties appearing and announcing ready for trial. The information having been read by the Criminal District Attorney of Bexar County, Texas, the defendant in open court pleaded guilty to the charge therein contained and waived a trial by jury and submitted this cause to the court; whereupon the court admonished the defendant of the consequences of such plea, but the defendant, William James Rummel

persisted in pleading guilty, and, after due inquiry, it plainly appearing to the court that the defendant is sane and is uninfluenced by any consideration of fear, by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of guilty was received by the court.

The court having heard and duly considered defendant's said plea of guilty to the charge contained in the information herein, and the evidence, is of the opinion and finds that the defendant is guilty of the offense of Aggravated Assault on a Female

and that his punishment should be, and the same is hereby assessed by confinement in the County Jail for a period of thirty (30) days and costs of Court, ~~maximum sentence to begin as of March 7th, 1968. Note: Sentence to run concurrent with No. 167599 out of County Court at Law No. 3~~ ~~in~~ therefore, considered, ordered and adjudged by the court that the State of Texas recover of the defendant the amount of such fine herein imposed upon him, and all costs of the prosecution, for which execution may issue against the property of said defendant; and that the defendant, being present in court be committed to jail, there to remain in custody, until such fine and all costs are paid and until he shall have fully satisfied and discharged the judgment and sentence herein imposed upon him as provided by law.

SENTENCE

On this the 23rd day of April, A.D. 19 68, this cause again being called; the State appeared by the Criminal District Attorney of Bexar County, Texas, and the defendant appeared in person and by counsel, Michael Hunter, for the purpose of having sentence of law pronounced in accordance with the verdict and judgment rendered against him on the 23rd day of April, A.D. 19 68; said defendant having waived the statutory ten days within which to file Motions for New Trial and in Arrest of Judgment herein;

And thereupon the said defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him and he answered nothing in bar thereof, whereupon the Court proceeded, in presence of said defendant, to pronounce sentence against him as follows, to-wit:

"It is the order of the Court that the defendant,

William James Rummel

who has been adjudged guilty of

Aggravated Assault on a Female

a misdemeanor, and whose punishment has been assessed at a fine of \$ -0- and costs of this prosecution and confinement in the county jail of Bexar County, Texas, for thirty (30) days

to be delivered to the Sheriff of Bexar County, Texas, for confinement in the county jail of Bexar County, Texas, for the period aforesaid and for the time necessary to discharge the costs of this prosecution and until the fine of \$ -0- and all costs of this prosecution are paid in accordance with law." NOTE: Sentence to run concurrent with No. 167599 out of County Court at Law No. 3.

And it appearing that defendant has been in jail continuously from his arrest on the 7th day of March, A.D. 19 68, to date, he is hereby given credit on this sentence from the 7th day of March, A.D. 19 68, to the date of this sentence for the time the said defendant has spent in jail in said cause.

H.J. Garcia

Judge Presiding

* * *
acting for S. Benton Davies
Judge of the County Court at Law No. 3
of Bexar County, Texas

THE STATE OF TEXAS,
COUNTY OF BEXAR.

I JAMES W. KNIGHT, Clerk of the County Court at Law No. 3 of Bexar County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the judgment of conviction in the case styled The State of Texas vs. William James Rummel, and being No. 157124 on the criminal docket of said court, and as appears in the criminal minutes of said court in volume 9, page 9, and sentence in such cause.

In testimony whereof witness my hand and official seal in the City of San Antonio, Texas, this 23rd day of April, 19 68.

JAMES W. KNIGHT,
Clerk, County Court at Law No. 3
of Bexar County, Texas

James W. Knight, Deputy.

Fee Book Volume 5 Page 274

157124
No. 157124

In the County Court at Law No. 3,
of Bexar County, Texas

CERTIFIED COPY OF JUDGMENT
WITH BILL OF COSTS

THE STATE OF TEXAS

vs.

William James Rummel

Address: in custody

Bondsman:

Address:

Bondsman:

Address:

By _____ Deputy.

Sheriff, Bexar County, Texas

SHERIFF'S RETURN

Come to hand the _____ day of _____, A.D. 19_____, and executed

APR 15
Lehrig, Bellon
the _____ day of _____, A.D. 19_____, by _____

C E R T I F I C A T E

THE STATE OF TEXAS,
COUNTY OF BEXAR

I, ROBERT D. GREEN, Clerk of the County Court at Law No. THREE, of Bexar County, Texas, do hereby certify that the foregoing is a true and correct copy of COMPLAINT AND INFORMATION, AND JUDGMENT WITH BILL OF COSTS,

In Cause No. 157124

wherein THE STATE OF TEXAS, vs

WILLIAM JAMES RUMMEL

Defendant,

as the same appears on file in my office.

Witness my hand and seal of the Court at my office in San Antonio, Texas, this the 15TH day of SEPTEMBER , A.D. 1978 .

ROBERT D. GREEN

Clerk of the County Courts at Law #3
of Bexar County, Texas

by Kathy G. McGuire, Deputy

No. 167599

County Court at Law No. 2
of Bexar County, Texas

THE STATE OF TEXAS

vs.

W. J. Rummel

403 Madison

OFFENSE

~~UNLAWFUL~~ SWINDLING BY WORTHLESS CHECK
(Writing Check Without Sufficient Funds)

UNDER \$50.00

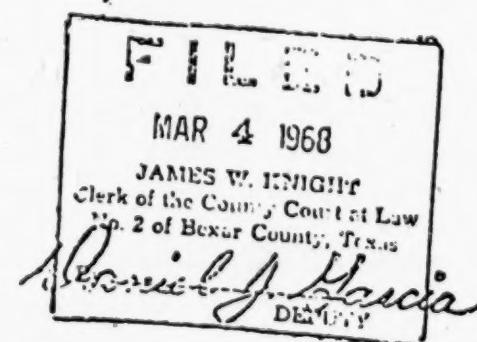
WITNESSES:

Hazel Belle
716 S. Presa

The Alamo National

Mr. P. Casillas

306 W. Commerce C-15163



In the Name and by Authority of the State of Texas:

Now comes the undersigned, Assistant Criminal District Attorney of Bexar County, Texas, upon the affidavit of Z. Stanley,

which is hereto attached and made a part hereof, and, in behalf of said State, presents in and to the County Court at Law No. 2 of Bexar County, Texas, that heretofore, to-wit: on or about the 21st day of February A. D. 19 68, and prior to the making and filing of this information in the County of Bexar and State of Texas,

W. J. Rummel

did then and there unlawfully, with intent to defraud Hazel Belle, agnt for Belle's Gulf Service Station, a sole owned business.

make, draw, utter and deliver and cause and direct the making, drawing, uttering and delivering to the said Hazel Belle,

a check, draft and order for the payment of money in the sum of five dollars and sixty-one cents, drawn on The Alamo National Bank of San Antonio, Texas,

which check, draft and order was in the tenor following:

W. J. or PERRY RUMMEL
403 MADISON
SAN ANTONIO, TEXAS 78210

Feb 21 1968

NUMBER
112
30-2
1140

PAY TO THE ORDER OF WOODARD BELLE \$5 61/
Five and 61/160 DOLLARS
THE ALAMO NATIONAL BANK OF SAN ANTONIO, TEXAS
W. J. Rummel

that the said Hazel Belle accepted said check, draft and order and believed it to be good, and its payment was relied upon by Hazel Belle and the said W. J. Rummel.

then and there did not have and knew he did not have sufficient funds in and on deposit with said bank to pay in full said check, draft and order and all other checks, drafts and orders outstanding upon such funds then outstanding; that said check, draft and order was presented to said bank for payment and payment was refused for want of sufficient funds of the said W. J. Rummel.

contrary to the forms of the statute, in such cases made and provided, and against the peace and dignity of the State.

J. L. Knott
Assistant Criminal District Attorney of Bexar County, Texas

In the Name and by Authority of the State of Texas:

Before me, the undersigned authority, on this day personally appeared Z. Stanley
who, after being by me duly sworn upon examination of the deposition and says that he has good reason to believe and
does believe that heretofore, to-wit on or about the 21st day of February A. D. 1968
and prior to the making and filing of this complaint, in the County of Bexar and State of Texas.

did then and there unlawfully, with intent to defraud Hazel Belle, agent for Belle's
Gulf Service Station a sole owned business.

make, draw, utter and deliver and cause and direct the making, drawing, uttering and delivering to the
said _____ Hazel Belle

a check, draft and order for the payment of money in the sum of five dollars and sixty-one cents.

The Alamo National Bank of San Antonio, Texas

which check, draft and order was in the tenor following:
W. J. or PERRY RUTCH
403 MADISON
SAN ANTONIO, TEXAS 78210

NUMBER
112

Feb 21 1968

30-2

PAY TO THE
ORDER OF WOODARD BELLE \$5 61/
Five and 61/100 DOLLARS

THE ALAMO NATIONAL BANK
OF SAN ANTONIO, TEXAS

that the said Hazel Bell accepted said check,
draft and order and believed it to be good, and its payment was relied upon by Hazel Bell.

then and there did not have and knew he did not have sufficient funds in and on deposit with said bank to pay in full said check, draft and order and all other checks, drafts and orders outstanding upon such funds then outstanding; that said check, draft and order was presented to said bank for payment and payment was refused for want of sufficient funds of the said

contrary to the forms of the statute, in such cases made and provided, and against the peace and dignity of the State.

Sworn to and subscribed before me on this, the 22th day of February, A.D. 1862.

A. D. 19-66

J. J. & H. M.
Assistant Criminal District Attorney of Bexar County, Texas.

Fine	Clerk	Trial Fee	Dist Atty.	Sheriff	Jury	Misc & Steno.	Total
\$1.00	\$15.00	\$5.00	(\$15.00)	\$9.00			\$45.00
							30 days in jail

Certified Copy of Judgment of Conviction on Plea of Guilty. Trial by Court.

THE STATE OF TEXAS
vs.
W. J. Sumwalt

No. 16,599
Offense: Swindling by worthless
check under \$50.00

23rd April 68

On this, the _____ day of _____, A.D. 19_____, the above entitled cause numbered cause was called for trial, both parties appearing and announcing ready for trial. The information having been read by the Criminal District Attorney of Bexar County, Texas, the defendant, in open court pleaded guilty to the charge therein contained and waived a trial by jury and submitted this cause to the court; whereupon the court admonished the defendant of the consequences of such plea, but the defendant
W. J. surreal

persisted in pleading guilty, and, after due inquiry, it plainly appearing to the court that the defendant is sane and is uninfluenced by any considerations of fear, by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of guilty was received by the court.

The court having heard and duly considered defendant's said plea of guilty to the charge contained in the information herein, and the evidence, is of the opinion and finds that the defendant is guilty of the offense of **Swindling by worthless check under \$50.00**.

and that his punishment should be, and
at \$1.00 fine and 30 days in the County jail and
the same is hereby assessed.
costs of court, sentence to run concurrent with 157124.

It is, therefore, considered, ordered and adjudged by the court that the State of Texas recover of the defendant the amount of such fine herein imposed upon him, and all costs of the prosecution, for which execution may issue against the property of said defendant; and that the defendant, being present in court, be committed to jail, there to remain in custody, until such fine and all costs are paid and until he shall have fully satisfied and discharged the judgment and sentence herein imposed upon him as provided by law.

SENTENCE

On this the 23rd day of April, A.D. 1968, this cause again being called, the State appeared by the Criminal District Attorney of Bexar County, Texas, and the defendant appeared in person and by counsel Michael Hunter for the purpose of having sentence of law pronounced in accordance with the verdict and judgment rendered against him on the 23rd April 68; said defendant having waived the statutory ten days within which to file Motions for New Trial and in Arrest of Judgment herein;

And thereupon the said defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him and he answered nothing in bar thereof, whereupon the Court proceeded, in presence of said defendant, to pronounce sentence against him as follows, to-wit:

"It is the order of the Court that the defendant,

W. J. Hummel, who has been adjudged guilty of
Swindling by worthless check under \$50.00

a misdemeanor, and whose punishment has been assessed at a fine of \$ 1.00 and costs of this prosecution and confinement in the county jail of Bexar County, Texas, for 30 days to be delivered to the Sheriff of Bexar County, Texas, for confinement in the county jail of Bexar County, Texas, for the period aforesaid and for the time necessary to discharge the costs of this prosecution and until the fine of \$ 1.00 and all costs of this prosecution are paid in accordance with law."

And it appearing that defendant has been in jail continuously from his arrest on the day of A.D. 19, to date, he is hereby given credit on this sentence from the day of A.D. 19, to the date of this sentence for the time the said defendant has spent in jail in said cause.

H. J. Garcia
Judge Presiding

THE STATE OF TEXAS,
COUNTY OF BEXAR.

I, JAMES W. KNIGHT, Clerk of the County Court at Law No. 110, of Bexar County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the judgment of conviction in the case styled The State of Texas vs. W. J. Hummel, and being No. 167599 on the criminal docket of said court, and as appears in the criminal minutes of said court in volume 38, page 19, and sentence in such cause.

In testimony whereof witness my hand and official seal in the City of San Antonio, Texas, this 23rd April 68

JAMES W. KNIGHT,
Clerk, County Court at Law No. 110,
of Bexar County, Texas.

Daniel J. Garcia, Deputy.

Fee Book Volume 27 Page 533

No. 167599

In the County Court at Law No. 110,
of Bexar County, Texas

**CERTIFIED COPY OF JUDGMENT
WITH BILL OF COSTS**

THE STATE OF TEXAS

vs.

W. J. Hummel

Address: custody

Bondsman:

Address:

Bondsman:

Address:

Cause heard the 7 day of April, A.D. 1968, by

James W. Knight, Clerk of the County Court at Law No. 110, of Bexar County, Texas, Deputy.

CERTIFICATE

THE STATE OF TEXAS,
COUNTY OF BEXAR

I, ROBERT D. GREEN, Clerk of the County Court at Law No. TWO, of
Bexar County, Texas, do hereby certify that the foregoing is a true
and correct copy of COMPLAINT AND DEFAMATION, AND JUDGMENT WITH BILL OF COSTS,

in Cause NO. 167599

N.:

60-977

JUDICIAL DISTRICT COURT
BEXAR COUNTY, TEXAS

THE STATE OF TEXAS

VS.

William J. Rummel

JUDGMENT
(PLEA OF GUILTY OR NOLO CON-
TENDERE BEFORE THE COURT)

wherein THE STATE OF TEXAS, vs.

W. J. RUMMEL

Defendant,

as the same appears on file in my office.

Witness my hand and seal of the Court at my office in San Antonio
Texas, this the 15th day of SEPTEMBER , A.D. 1978 .

ROBERT D. GREEN

Clerk of the County Courts at Law #2
of Bexar County, Texas

by Kathy G. McGuire, Deputy

MINUTES, 144th JUDICIAL DISTRICT COURT, BEXAR COUNTY, TEXAS VOL: 30
AT 11:00 A.M. TERM, A. D. 1969 PAGE: 288-

JUDGMENT - PLEA OF GUILTY OR NOLO CONTENDERE BEFORE THE COURT - FELONY
THE STATE OF TEXAS NO: 68-977
VS. OFFENSE: PASSING AS TRUE A FORGED INSTRUMENT
WILLIAM J. RUMMELL

On this 11th day of March, A. D. 1969, the above entitled and numbered cause being called for trial, appeared the parties, State of Texas by her district attorney, and the defendant William J. Rummell, in person and by counsel, Claude Bailey, and both parties announced ready for trial. Said defendant, having been duly arraigned, entered a plea of GUILTY to the first paragraph of the indictment herein on this date. And the defendant having in open court and in writing waived his right of trial by jury, such waiver being with the consent and written approval of the district attorney; said waiver is hereby approved by the court, entered of record on the minutes of the court and ordered filed in the papers of this cause. Thereupon the court admonished the defendant of the consequences of such plea; but the defendant persisted in such plea, and after due inquiry, it plainly appearing to the court that the defendant is sane and uninfluenced by any consideration of fear, or by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of GUILTY was received by the court and is now entered of record. And the court having heard said plea and having heard the evidence which was submitted (including stipulated evidence under the provisions of Article 1.15, Code of Criminal Procedure) and the argument of counsel, and having duly considered the same, finds that the defendant is guilty of a felony, to-wit: Passing As True A Forged Instrument as charged in the first count of the indictment, and should be punished by confinement in the Texas Department of Corrections for a term of four (4) years.

It is therefore CONSIDERED, ORDERED AND ADJUDGED by the court that the defendant William J. Rummell is guilty of the felony offense of Passing As True A Forged Instrument to which he has pleaded, and that he should be punished, as has been determined by the court, at confinement in the Texas Department of Corrections for a term of four (4) years.

It is further ORDERED by the Court, that the State of Texas do have and recover from said defendant all costs of prosecution for which execution may issue, and the defendant be remanded to jail (~~to await the further order of this court~~) to await the further order of this court.

11:00 A.M., 11-11-69

JUDGE PRESIDING

THE STATE OF TEXAS X
COUNTY OF BEXAR X

I, HART MCCORMICK, Clerk of the District Courts in and for Bexar County, Texas, do hereby certify that the above and foregoing is a true and correct transcript of the Original Judgment, Sentence, Etc. rendered and entered in Cause No: 11-77 entitled THE STATE OF TEXAS versus William J. Rummell, as the same appear of record on the Criminal Minutes of the District Court in and For Bexar County, in Volume 3 at Pages: 288-

IN TESTIMONY WHEREOF, I hereunto sign my name and affix the seal of said Court, at office in San Antonio, Texas, this the 11th day of March, A. D. 1969.

NO APPEAL PERFECTED

Hart McCormick
HART MCCORMICK
Clerk, District Courts, Bexar County, Texas

By: *John J. DeCoes*, Deputy

NO: 68-977

11:00 JUDICIAL DISTRICT COURT
BEXAR COUNTY, TEXAS

THE STATE OF TEXAS

IS.

John J. DeCoes

SENTENCE

MINUTES, ~~JUDICIAL DISTRICT COURT, BEXAR COUNTY, TEXAS~~, NO. 30
67 TERM, A.D. 1969 PAGE 1

Sentence -----
 THE STATE OF TEXAS ----- NJ.T 63-272

VS. William J. Russell OFFENSE: PASSED AN ARMED PUNISHMENT

On this the 11th day of March, A. D. 1969, this cause being again called; the State appeared by the District Attorney and the defendant appeared in person and by counsel Claude Bulley, for the purpose of having sentence of the law pronounced in accordance with the ~~verdict~~ judgment rendered and entered against him on March 11, 1969; said defendant having waived the Statutory Ten Days in which to file a Motion for a New Trial herein:

And thereupon the said defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said defendant to pronounce sentence against him as follows, to-wit: "It is the order of the Court that the defendant William J. Russell who has been adjudged to be guilty of

Passing a False Armed Instrument a felony, and whose punishment has been assessed at confinement in the Texas Department of Corrections for Four (4) years, be delivered by the Sheriff of Bexar County, Texas, immediately to the Director of Corrections of the State of Texas, or other person legally authorized to receive such convicts, and said defendant shall be confined in said Department of Corrections for not less than two (2) years nor more than four (4) years, in accordance with the provisions of the law governing the Texas Department of Corrections."

Said defendant is hereby given credit on this sentence from the 12th day of February, A. D. 1969 to the date of this sentence, for the time the said defendant has spent in jail in said cause.

And the said defendant is remanded to jail until said Sheriff can obey the directions of this sentence.

W. J. Russell
 WALTER J. RUSSELL, JUDGE PRESIDING

NO.: 72-272

JUDICIAL DISTRICT COURT
 BEXAR COUNTY, TEXAS

THE STATE OF TEXAS

VS.

JUDGMENT
 (PLEA OF GUILTY OR NOLO CON-
 TENDER BEFORE THE COURT)

NO. 187th JUDICIAL DISTRICT COURT, BEXAR COUNTY, TEXAS VOL: 7
AT MARCH TERM, A. D. 1973 PAGE: 24

JUDGMENT - PLEA OF GUILTY OR NOLO CONTENDERE BEFORE THE COURT - FELONY
THE STATE OF TEXAS NO.: 72-2721
VS. WILLIAM J. RUCKELL OFFENSE: WORTHLESS CHECK OF THE VALUE OF \$50 OR OVER

On this 10th day of APRIL, A. D. 1973, the above entitled and numbered cause being called for trial, appeared the parties, State of Texas by her district attorney, and the defendant WILLIAM J. RUCKELL, in person and by counsel, WILLIAM CIRKAULT III, and both parties announced ready for trial. Said defendant, having been duly arraigned, entered a plea of GUILTY to the indictment herein on this date. And the defendant having in open court and in writing waived his right of trial by jury, such waiver being with the consent and written approval of the district attorney; said waiver is hereby approved by the court, entered of record on the minutes of the court and ordered filed in the papers of this cause. Thereupon the court admonished the defendant of the consequences of such plea; but the defendant persisted in such plea, and after due inquiry, it plainly appearing to the court that the defendant is sane and uninfluenced by any consideration of fear, or by any persuasion or delusive hope of pardon prosecution, GUILTY prompting him to confess his guilt, the said plea of GUILTY was received by the court and is now entered of record. And the court having heard said plea and having heard the evidence which was submitted (including stipulated evidence under the provisions of Article 1.15, Code of Criminal Procedure) and the argument of counsel, and having WORTHLESS CHECK OF THE VALUE OF \$50 OR OVER CONSIDERED THE EVIDENCE AND THE DEFENDANT'S STATEMENT CONCERNING SAID OFFENSE ON JULY 21, 1972 as charged in the indictment, and should be punished by confinement in the Texas Department of Corrections for a term of THREE (3) years.

It is therefore CONSIDERED, ORDERED AND ADJUDGED by the court that the defendant WILLIAM J. RUCKELL is guilty of the felony offense of WORTHLESS CHECK OF THE VALUE OF \$50 OR OVER to which he has pleaded, and that he should be punished, as has been determined by the court, at confinement in the Texas Department of Corrections for a term of THREE (3) years.

It is further ORDERED by the Court, that the State of Texas do have and recover from said defendant all costs of prosecution for which execution may issue, and the defendant be (remanded to jail) (COMMITMENT) to await the further order of this court.

J. G. Ruckell
JUDGE PRESIDING

NO. 187th JUDICIAL DISTRICT COURT, BEXAR COUNTY, TEXAS VOL: 7
AT MARCH TERM, A. D. 1973 PAGE: 29

SENTENCE
THE STATE OF TEXAS NO. 72-2721
VS. WILLIAM J. RUCKELL OFFENSE: WORTHLESS CHECK OF THE VALUE OF \$50 OR OVER

On this the 10th day of APRIL, A. D. 1973, this cause being again called, the State appeared by the District Attorney and the defendant appeared in person and by counsel WILLIAM CIRKAULT III, for the purpose of having sentence of the law pronounced in accordance with the Guilty judgement rendered and entered against him on APRIL 10, 1973 said defendant having waived the Statutory Ten Days in which to file a Motion for a New Trial herein;

And thereupon the said defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said defendant to pronounce sentence against him as follows, to wit: "It is the order of the Court that the defendant WILLIAM J. RUCKELL, who has been adjudged to be guilty of WORTHLESS CHECK OF THE VALUE OF \$50 OR OVER a felony, and whose punishment has been assessed at confinement in the Texas Department of Corrections for THREE (3) years, be delivered by the Sheriff of Bexar County, Texas immediately to the Director of Corrections of the State of Texas, or other person legally authorized to receive such convict, and said defendant shall be confined in said Department of Corrections for no less than TWO (2) years nor more than THREE (3) years, in accordance with the provisions of the law governing the Texas Department of Corrections."

It is further ordered that said sentence do begin and operate from JULY 21, 1972.

Whereupon the Court advised the defendant fully as to his right of appeal, and no notice of appeal having been given, the said defendant is remanded to jail until said Sheriff can obey the directions of this sentence.

J. G. Ruckell
JUDGE PRESIDING

NO: 72-2721

187 JUDICIAL DISTRICT COURT

THE STATE OF TEXAS

W.S. William S. Clegg

SENTENCE

MINUTES, JUDICIAL DISTRICT COURT, BELL COUNTY, TEXAS
AT : TUES., A. M. 19 73

W.L. 2 7
P.M.L. 1 33

VERDICT IS INJURY - YOU ARE ORDERED TO PAY AND SUE DIVISION A BASED IN MC
THE STATE OF TEXAS

VS. OFFENDER: THAT OVER FIFTY SOLDIERS
WILLING TO DIE FOR ITALY

On this 20th day of April, A. D. 1973, the above entitled and numbered cause being called for trial, appeared the parties, the State of Texas by her district attorney, and defendant, WILLIAM F. BROWN L. in person and by counsel, JOHN R. COOPER, III and both parties having announced ready for trial; said defendant having heretofore been duly arraigned and entered a plea of Not Guilty.

Thereupon a jury composed of _____ and eleven others was selected, impanelled and sworn, and after hearing the indictment read, the defendant's plea of not guilty thereto and the evidence submitted, and having been charged by the Court as to their duty to determine the guilt or innocence of the defendant, and heard the arguments of counsel thereon, they retired in charge of the proper officer and returned into open court, in due form of law, on the 11th day of July A. D. 1973, the following verdict which was received by the Court and is now entered upon the minutes:

131 6-1973 3.2.2328

Forward

11/12/2013 8:57 AM

Rezension

It is therefore CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant is guilty of the offense of WANT OVER FIFTY DOLLARS IN PAUPER'S BOND (MURDER), and that he be punished, as has been determined by the jury, at confinement in the Texas Department of Corrections for a term of "LIFE" years.

It is further ORDERED by the Court, that the State of Texas do have and recover from said defendant all costs of prosecution for which execution may issue, and the defendant be remanded to jail (REMITTED TO SHERIFF) to await the further order of this court.

the further order of this court.
John Fennell
JUDGE PRESIDING

MINUTES, 1973 JUDICIAL DISTRICT COURT, BEXAR COUNTY, TEXAS VOL. 378
 AT MARCH TERM, A. D. 1973 PAGE 378

SENTENCE

THE STATE OF TEXAS

NO. 73-CR-225VS.
WILLIAM J. SCHMIDOFFENSE: THEFT OVER FIFTY DOLLARS
BY FALSE PRETEXT (HABITUAL)

On this the 25th day of APRIL A. D. 1973, this cause being again called, the State appeared by the District Attorney and the defendant appeared in person and by counsel - WILLIAM J. SCHMID, III, ELLIOTT VANCE, JR., for the purpose of having sentence of the law pronounced in accordance with the verdict and judgment and entered against him on APRIL 10, 1973
NO MOTION FOR NEW TRIAL MADE OR FILED ON THIS DATE APRIL 25, 1973
SENTENCE PENDING TRIAL AND DEFENDANT REMAINED IN JAIL.

And thereupon the said defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereto. Thereupon the Court proceeded, in the presence of said defendant to pronounce sentence against him as follows, to-wit: "It is the order of the Court that the defendant WILLIAM J. SCHMID, who has been adjudged to be guilty of THEFT OVER FIFTY DOLLARS BY FALSE PRETEXT (HABITUAL) a felony, and whose punishment has been assessed at confinement in the Texas Department of Corrections for THREE (3) years, be delivered by the Sheriff of Bexar County, Texas immediately to the Director of Corrections of the State of Texas, or other person legally authorized to receive such convict, and said defendant shall be confined in said Department of Corrections for THREE (3) years, in accordance with the provisions of the law governing the Texas Department of Corrections."

It is further ordered that said sentence do begin and operate from: _____

Whereupon the Court advised the defendant fully as to his right of appeal, and NO right of appeal having been given, the said defendant is remanded to jail until said Sheriff can obey the directions of this sentence.

WHEREUPON, IN OPEN COURT, BY AND THROUGH HIS COUNSEL, DEFENDANT GAVE NOTICE OF APPEAL TO THE COURT OF CRIMINAL APPEALS AT AUSTIN, TEXAS AND THAT SAME, SAID DAY, SAME IS HEREBY GRANTED THIRTY (30) DAYS IN WHICH TO PRACTICE HIS APPEAL AND, IN THE MEANTIME, EXECUTION OF THE SENTENCE THERIN STATED IS SUSPENDED. DUE TO THE INABILITY OF THE MANDATE OF THE COURT OF CRIMINAL APPEALS AT AUSTIN, TEXAS AND DEFENDANT IS REMANDED TO JAIL.

J.W. B. Presiding
JUDGE PRESIDING